92-1866

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

DAVID A. GOODWIN,

Petitioner,

versus

DEPARTMENT OF THE TREASURY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Federal Circuit err when it created a new immunity from liability for federal employees who initiate negative and derogatory communications to co-employees of the same Agency as well as release unauthorized investigation files to third parties, when both actions were in breach of a voluntary resignation agreement?

2. Did the Court of Appeals for the Federal Circuit err when it failed to even consider the violation of the rights to due process of the petitioner which would otherwise require reversal of the determination failing to reinstate the petitioner to his employment?

3. Did the Court of Appeals for the Federal Circuit err when it failed to consider the impact of the petitioner's lawful rescission of his initial resignation after he discovered that the Agency breached the retirement settlement agreement?

PARTIES TO THE PROCEEDING

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v.

United States Department of the Treasury, Respondent

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JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

1. On February 23, 1993, the United States Court of Appeals for the Federal Circuit denied the petitioner's Petition For Rehearing and declined a suggestion for rehearing *in banc*, after the same had been timely submitted to said Court by the petitioner. The United States Court of Appeals for the Federal Circuit, on December 18, 1992, after argument and submission, affirmed a determination made by the Merit Systems Protection Board.

2. This Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This action concerns judicially developed case law and reference to the following statutory and regulatory provisions:

* * *

5 U.S.C. § 7701(c)(2)(A):

Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment –

(A): shows harmful error in the application of the agency's procedures in arriving at such decision;

* * *

5 U.S.C. § 7703 (c):

In any case filed in the United States Court of Claims or United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be –

(1): arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2): obtained without procedures required by law, rule, or regulation having been followed; or

(3): unsupported by substantial evidence;

* * *

28 U.S.C. § 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

* * *

5 C.F.R. § 715.202 Resignation. (a):

General. An employee is free to resign at any time, to set the effective date of his resignation, and to have his reasons for resigning entered in his official records.

(b) *Withdrawal of Resignation.* An agency may permit an employee to withdraw his resignation at any time before it has become effective. An agency may decline a request to withdraw a resignation before its effective date only when the agency has a valid reason and explains that reason to the employee. A valid reason includes, but is not limited to, administrative disruption or the hiring or commitment to hire a replacement. Avoidance of adverse action proceedings is not a valid reason.

* * *

31 C.F.R. § 0.735.55 Falsification of official records.

(a) Employees shall avoid making false, misleading or ambiguous statements, deliberately or willfully, whether oral or written, in connection with any matter of official interest. Some of these matters of official interest are: Transactions with the public, other Federal agencies or fellow employees; application forms and other forms which serve as a basis for appointment, reassignment, promotion or other personnel action; vouchers; leave records; work reports of any nature or accounts of any kind; affidavits; entry or record of any matter relating to or connected with the employee's duties; and report of any moneys or securities received, held or paid to, for or on behalf of the United States.

(b) Furnishing false information may subject employees to dismissal from Federal employment, or

other disciplinary or adverse action; and may also result in criminal prosecution (18 U.S.C. 1001).

* * *

IRM 0715.4 (10-24-80) (3):

Conditional resignations are not acceptable. If the employee submits a statement of conditions under which he/she will resign, it must be refused. A notice of resignation accepted by the Service may be withdrawn prior to its effective date only by mutual agreement between Internal Revenue officials and the employee.

* * *

5 C.F.R. § 1201.21 Notice of Appeal Rights.

When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following:

(a) Notice of the time limits for appealing to the Board, the requirements of § 1201.22(c), and the address of the appropriate Board office for filing the appeal;

(b) A copy, or access to a copy, of the Board's regulations;

(c) A copy of the appeal form in appendix I of this part; and

(d) Notice of any right the employee has to file a grievance.

STATEMENT OF THE CASE

The petitioner herein, David A. Goodwin, involuntarily resigned from the competitive service position of Program Manager (Chief, Examination Division, GM-15) at the Internal Revenue Service, Buffalo, New York District Office in January 1987. (Appendix, hereinafter, "A-5.") He subsequently requested a hearing before the Merit Systems Protection Board (hereinafter, "MSPB") with regards to said involuntary resignation. The petitioner had approximately 19 years of service with the Internal Revenue Service before he resigned his position, which resignation was effective on June 15, 1987. At the time of said involuntary resignation and when he filed his appeal and refiled his appeal with the MSPB, the Petitioner was not serving in a probationary period.

Prior to November, 1986, in the 19 years of his employment with the Internal Revenue Service, the petitioner had never received any type of disciplinary action of any sort whatsoever and he received an overall outstanding rating in his last performance appraisal in or about October, 1986. This was the first time that a division chief in Buffalo had ever received this high a rating. (A-28.) The petitioner had received several other outstanding and superior ratings while employed at the Agency, had received other merit rating pay increases and had even received cash awards from the Agency for the high quality of his work. In fact, every year that the petitioner held his position, he received performance awards from the IRS (hereinafter, "Agency"). (A-28.)

On December 8, 1986, the Buffalo District Director, Gary Matthews, orally informed the petitioner that he

was being placed on special assignment, after being told on the telephone on the previous Saturday night after Thanksgiving that he should not return to his managerial job, as he was being placed on immediate administrative leave. (A-33.) This, he was informed by Mr. Matthews, was to be an assignment pending completion of an investigation into anonymously presented allegations that supposedly stated that the petitioner had engaged in alleged "misconduct" during an off-site, after-hours, private Halloween party. These allegations were made by an anonymous letter and were totally unsubstantiated. (A-34.)

What took place over the next eight weeks of the petitioner's life was best described by the U.S. Court of Appeals for the Federal Circuit in the case of *James Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988), when the Court stated that the actions of the Agency with regards to this alleged "investigation" of the party were, in fact, "frivolous, innocuous and unsupported by any evidence." *James Grubka v. Department of the Treasury, supra.*

While the so-called investigation was pending, the petitioner was placed in his special assignment until December 23, 1986, when Mr. Matthews orally informed the petitioner that the Agency intended to propose his demotion for misconduct unless the petitioner agreed to choose a voluntary demotion. (A-35.) At no time since the initial investigation commenced, up until this point, had the petitioner ever been presented in writing, as required by law, any of his rights to appeal any action of the Agency to the MSPB. (A-71.)

An oral settlement agreement was eventually reached whereby the petitioner agreed to resign from the Agency in exchange for, among other things, a "clean record." (A-5, 57.)[1] Specifically, it was agreed by all parties that the petitioner would resign under the following conditions: (a) his resignation would occur after accumulation of all of his sick leave; (b) he would leave the Agency with a clean record, with no indication of the alleged investigation in his record; (c) he would receive a mutually acceptable letter of recommendation from Mr. Matthews (A-83); and (d) the Agency employee newspaper would have a positive article regarding the reason for his resignation. (A-57.)

On January 29, 1987, in reliance upon the oral agreement between the parties, the petitioner signed a post-dated document which was a written resignation. Subsequently, the Agency issued a Standard Form (SF) 50, Notification of Personnel Action, documenting that the petitioner had resigned effective June 15, 1987, and that document contains no reference to the so-called investigation into the allegations of misconduct. (A-77.) The intent of the parties was that the petitioner was to have a

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[1] The petitioner and his predecessor counsel testified before the MSPB that part of the Agreement to retire included destruction of the entire investigative file and an agreement to keep said file completely confidential. (A-59.) This was controverted by the Agency. (A-59). After the hearing, the Agency found that there was no agreement to destroy the file but declined to rule on whether a non-disclosure agreement was reached with regards to the investigative materials. (A-59.) However, the MSPB and the Court below never addressed this determination of fact.

"clean record" which would preserve his professional reputation, in order to facilitate his job transition by justifiably providing favorable information regarding his employment with the Agency and to preclude disclosure of the circumstances leading to the petitioner's resignation. (A-22.)

Soon thereafter, in March of 1987, the petitioner notified Mr. Hermann (regional counsel for the Agency at the time) of the fact that he felt that the Agency had breached the agreement by providing the unexpurgated investigative file to other parties, despite the agreement. (A-70.) No appeal rights were ever provided the petitioner after this notification of breach. (A-71.)

When no action was taken with regard to said oral notification of breach of the agreement, the petitioner, by letter dated June 4, 1987, addressed to Mr. Matthews, attempted to rescind his resignation in accordance with 5 C.F.R. § 715.202(b), prior to its effective date. (A-84.) Mr. Matthews responded on June 15, 1987, by simply denying the petitioner's request, stating that the effective date of the resignation would not be postponed and he enclosed with that letter a copy of the SF-50 document. (A-85.) No appeal rights were ever given to the petitioner.

The petitioner subsequently wrote several letters to the Agency concerning the Agency's refusal to permit him to rescind his resignation and further alleging that Mr. Matthews had acted improperly in refusing to accept the withdrawal of the resignation. The Agency responded to those letters stating that the Agency's actions were proper. (A-86, 87, 88.) The Agency, again, failed to inform the petitioner that he had a right to appeal to the MSPB if

he believed that his resignation was indeed involuntary. (A-86, 87, 88.) No written or even oral notice with regards to his MSPB rights was ever given to him. (A-70, 71, 72.)

After the effective date of his resignation, the petitioner filed an Application with the Agency's Director of Practice seeking authorization to practice before said Agency, this being the only field for which the petitioner had ever been educated or trained. (A-6.) Mr. Matthews, on December 9, 1987, wrote an extraordinarily derogatory memorandum to the Director of Practice, revealing elements of the alleged investigation of the petitioner and volunteering his "strong opposition" to the petitioner's application for authorization to practice before the Agency. (A-81.)

On May 16, 1990, the petitioner filed an appeal with the MSPB alleging, *inter alia*, that he lacked the mental capacity to submit his resignation, the Agency obtained his resignation through coercion and duress, the Agency violated the terms of the oral settlement agreement, thus obtaining his resignation through deception, the Agency violated 5 C.F.R. § 715.202(b) by denying his request to withdraw his resignation before the effective date of said resignation, that the resignation was invalid under Internal Revenue Manual (hereinafter "IRM") § 0715.4(3) because it was conditional, that the Agency forced him to resign because of his quality initiative program, and that the Agency failed to provide him with his appeal rights to the MSPB regarding his resignation and therefore good cause existed for his delay in filing his appeal. (A-31.)

On September 10, 1990, a full evidentiary trial was conducted before Arthur Joseph, the Administrative Judge of the MSPB in New York City.

On October 25, 1990, the Administrative Judge issued his MSPB Initial Decision declaring, *inter alia*, that the petitioner's resignation had been rendered involuntary by actions of the Agency and ordering the petitioner's reinstatement. (A-27-76.) Post-hearing submissions and petitions for review were filed before the MSPB Opinion and Order was issued on December 20, 1991, reversing the Initial Decision. (A-10-20.) There was also a dissent to said Opinion and Order filed by the Vice-Chairman of the MSPB. (A-21-25.)

A timely appeal was filed by the petitioner in the United States Court of Appeals for the Federal Circuit.

On December 18, 1992, after full briefing and oral argument, the U.S. Court of Appeals for the Federal Circuit entered judgment affirming the decision of the MSPB. (A-3-9.) The petitioner filed a timely Petition for Rehearing which was denied on February 23, 1993. (A-1-2.)

The opinion below, and subsequent denial of the Petition for Rehearing, have created a new immunity for federal employees that effectively denies the petitioner any remedy and for which there is absolutely no precedent established by Congress, this Court or any Court of Appeals. Furthermore, the lower court has failed to address other vital substantive issues raised by the petitioner.

ARGUMENT FOR GRANTING OF THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT ERRED WHEN IT CREATED, OUT OF WHOLE CLOTH, AN IMMUNITY FOR FEDERAL EMPLOYEES WHO BREACH A VOLUNTARY RESIGNATION AGREEMENT.

The Court below had jurisdiction to review the findings and conclusions of the Merit Systems Protection Board (hereinafter referred to as "MSPB") pursuant to 5 U.S.C. § 7703(c). The standard of review that the lower Court should have employed on the instant matter had been previously determined by said Court in the recent case of *Gromo v. Office of Personnel Management*, 944 F.2d 882 (Fed.Cir. 1991).

The United States Court of Appeals for the Federal Circuit stated in *Gromo* that when reviewing a decision of the MSPB, said decision would be affirmed unless it is found to be:

> (1) arbitrary, capricious, abusive discretion or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rules or regulations having been followed; or
>
> (3) unsupported by substantial evidence. (citations omitted).

Gromo v. Office of Personnel Management, supra, at 884; 5 U.S.C. § 7703(c).

Thus, the Court below was given significant discretion when reviewing a decision of the MSPB to look at the

entire record before the MSPB in order to make a determination as to whether or not the decision was arbitrary, an abuse of discretion or contrary to existing law.

Furthermore, the lower Court had discretion to take into consideration all relevant factors so as to assure that the MSPB, when making its determination, did not ignore existing precedent or overlook vital legal issues. *Steger v. Defense Investigative Service Department of the Department of Defense*, 717 F.2d 1402 (Fed.Cir. 1983).

Turning to the facts of the instant case, the Court below was asked to make a legal determination as to whether or not the resignation of the petitioner was "voluntary," as that term has been defined by both the MSPB and the Federal Circuit. The criteria for voluntariness is quite simple. The Court below, in previous decisions, had already stated that "freedom of choice" of the employee is the guiding principle in determining whether or not a resignation is indeed "voluntary." *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574 (Fed.Cir. 1983). As the Lower Court stated in *Scharf*, the voluntariness of a resignation is determined by whether or not the employee, (a) resigned under duress brought about by government action; (b) unsuccessfully tried to withdraw the resignation before its effective date; (c) submitted a resignation under time pressure; (d) failed to understand the situation due to mental incompetency; or (e) the resignation was obtained by the Agency's misrepresentation or deception. *Scharf v. Department of the Air Force, supra* at 1574 (citations omitted).

In the instant matter, the lower Court found that the resignation of the petitioner remained voluntary even

after a breach of said agreement by Mr. Matthews. (A-3-9.) The sole ground for said determination was that the District Director, Gary Matthews, the chief antagonist of the petitioner, and the Director of Practice of the Internal Revenue Service, Leslie Shapiro, were both employees of the Internal Revenue Service, and that therefore their communications, even if in violation of the resignation agreement, were "an internal communication from within the agency from one officer to another as part of the routine and ongoing business of the agency," which could not render the resignation legally "involuntary." (A-9.)

This astonishing determination, in light of the rest of the opinion of the Court of Appeals, and in light of the egregious actions of Mr. Matthews to not only discredit but to destroy Mr. Goodwin (A-81, 82), clearly violates the previous precedents of that same Court as to the standard of review necessary to determine the voluntariness of a resignation.[2] Furthermore, the opinion was written in a total vacuum, as there was absolutely no citation to any precedent for carving out this new immunity for Federal employees who commit wrongdoing while in the course of their employment. (A-3-9.)

The lawful standard of review for a voluntary resignation settlement is to review all of the surrounding circumstances in order to test whether or not the

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[2] It can not be overemphasized that the petitioner's livelihood has literally been destroyed by Mr. Matthews' interference with the petitioner's Application to the Director of Practice. Not only was this area the only one where the petitioner could earn a living, but Mr. Matthews' memorandum literally held said application in abeyance for over 4-1/2 years.

employee (the petitioner herein) was able to exercise free choice when he entered into the resignation agreement. *Scharf v. Department of the Air Force, supra.*

This "free choice" or "informed choice" requires that the petitioner show that a "reasonable person" would have been misled by the Agency's statements or omissions. This is an objective test, not a test which relies upon the subjective opinions of either party or the employment status of the parties involved. This test requires that the lower Court analyze all of the facts and circumstances surrounding the resignation and the actions taken by the Agency subsequent to that resignation. *Scharf v. Department of the Air Force, supra.*

As is noted in the opinion of the Administrative Judge (A-27-76) and the dissenting MSPB member (A-21-26), it is clear that the petitioner, as a "reasonable person," was overtly misled by the Agency when it promised his resignation would be with a "clean record" and then when the promising party, Gary Matthews, proceeded to write the extraordinary memorandum (A-81, 82) to Mr. Shapiro which held up the petitioner's practice application for years. A "clean record" is a "clean record" and this means no derogatory, defamatory or speculative tirades by fellow employees about the petitioner. (See A-27-76 and 21-26 for opinions of Administrative Judge and dissenting MSPB member, respectively.)

The opinion of the lower Court, however, erroneously relies upon the status of Mr. Shapiro and Mr. Matthews as employees of the same Agency as the determining factor when deciding whether or not the voluntary resignation settlement agreement between the

petitioner and the Agency was breached by the Agency, thus rendering the resignation involuntary. (A-9.) There is absolutely no settled law of any sort, nor is there any citation in the lower Court's opinion, that would distinguish whether or not the negative, derogatory and false communications about the petitioner from Mr. Matthews to Mr. Shapiro (A-81, 82) attained any different luster, identity or legal status by virtue of the fact that the parties who communicated these harangues happened to be working for the same Agency.

It is undisputed in this matter that the parties entered into a resignation agreement in which the petitioner resigned in exchange for a "clean personnel record." (A-5.) It is also undisputed that Mr. Matthews wrote a laudatory letter of reference for the petitioner as part of his obligations under the settlement agreement. (A-83.)

There is also no dispute about the fact that Mr. Matthews communicated with Mr. Shapiro about ten (10) months after writing the laudatory reference letter about the petitioner, stating, *inter alia*, that he strongly opposed Mr. Goodwin's application for a treasury practice card and that Mr. Goodwin had resigned, "in the face of an administrative investigation which would likely have resulted in adverse action against Mr. Goodwin." (A-81, 82.) This statement by Mr. Matthews clearly states that, in his opinion, the petitioner did not resign with a clean record. This statement breached the original voluntary retirement, thus rendering it involuntary. (A-64.)[3] These

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[3] The comments of Mr. Matthews, as pointed out repeatedly to the lower Court, were totally speculative, at best, and

facts were established in the original administrative hearing and are, in fact, undisputed by the parties. (A-64.) When this letter is juxtaposed against the original reference letter (A-83), this further highlights the deception of the petitioner by Mr. Matthews.

However, the lower Court's opinion, while implicitly admitting the same with regards to the breach of the agreement by Mr. Matthews, simply ignores the "reasonable person" standard of review and the issue of "free choice" with regards to the resignation. Instead, out of whole cloth, the lower Court carves out for Mr. Matthews and the Agency an immunity from wrongdoing which never existed in Federal law before this lower Court opinion. This immunity seemingly attaches to Federal employees, acting in their capacity as Federal officials, when the wrongdoing is communicated between officials of the same department.

There is simply no legal logic for this type of determination. The lawlessness that could ensue in an Agency if this type of immunity is allowed to stand is dangerous, at best. Furthermore, such a judicially created immunity clearly has no legal precedent.

The fact scenario in the instant matter has been a horrifying spectacle of Agency abuse committed by one who appears to have a specific vendetta against the petitioner. The lower Court, in its opinion, has given license

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intentionally misrepresentative of the truth, since *no* charges were ever proffered against Mr. Goodwin. Thus, Mr. Matthews' pronouncement of "guilt" of some charge has absolutely no basis in fact. (A-64.) It appears this destructive statement was merely hysterical hyperbole.

and sanction to said actions which have destroyed the petitioner's life. This decision gives the go-ahead to federal employees to falsely accuse other employees and even "blackball" them for life without any fear of legal reprimand or sanction. This unfettered federal invincibility should not have been created by the lower Court nor should it be sanctioned by this Court. It is undisputed in the instant matter that the statements that had been made by Mr. Matthews in his memorandum to Mr. Shapiro (A-81, 82) were pure speculation, as there is nothing in the record and no information that was before Mr. Matthews at the time that he wrote the memo that would even suggest or hint that the conclusions that he had made were true, since no charges were ever proffered against the petitioner and no action was ever taken against him. (A-61.)

The standard that the lower Court should have utilized when reviewing the resignation settlement agreement, and the subsequent involuntariness of that agreement, in light of the actions of Mr. Matthews after the agreement was reached, is whether or not a "reasonable person" would have been misled by promises that were made by the Agency and the subsequent actions that were taken by said Agency. *Covington v. Department of Health and Human Services*, 750 F.2d 937 (Fed.Cir. 1984). The lower Court implicitly admits that a "reasonable person" such as the petitioner in this matter, would have indeed, been misled by the Agency's actions when Mr. Matthews sent the derogatory memo to anyone outside of the Agency. (A-8.) Then the lower Court dips into a new area by establishing a new criteria for immunity from

liability, to wit: the employment status of the recipient of the wrongful communication. (A-9.) This deviates substantially from previous case law in this area.

It is incomprehensible and inconceivable that so-called "internal communications" and communications by someone in an Agency to a third party could really be different, as a matter of law. The lower Court's interpretation of the settlement agreement between the parties is a question of law, *Greco v. Department of the Army*, 852 F.2d 558 (Fed.Cir. 1988), and this new immunity created by the lower Court is a new judicially created anomaly that must be stricken.

The lower Court simply ignored the established standards created by the Federal Circuit in previously decided cases and cast aside the "free choice" requirement or the "reasonable person" standard. Now, any deceptive action that a federal employee wishes to take in violation of a lawfully-agreed-to settlement can be abrogated by a so-called "internal communications" exception to liability, even if the communications are false, misleading and clearly in violation of a resignation agreement.

This unprecedented stray from established law and ensuing creation of immunity from liability where none previously existed is a very dangerous departure from accepted judicial practice and raises a serious issue of federal law that should be settled by this Court.

II. THE LOWER COURT IGNORED THE ALLEGATIONS OF VIOLATIONS OF THE PETITIONER'S RIGHTS OF DUE PROCESS, WHICH VIOLATIONS WOULD REQUIRE REVERSAL OF THE M.S.P.B. ORDER.

In addition to deceiving the petitioner into resigning, the Agency also denied him his rights to due process of law by failing to notify him of his right to appeal to the MSPB the actions taken against him by the Agency.[4] These denials were "harmful errors" warranting reversal of the Agency's decision. On at least three (3) undisputed occasions, the Agency failed to provide the petitioner with any of his appeal rights to the MSPB after the Agency had taken adverse action against him. (A-70, 71.) This Court has stated, and the MSPB and the Federal Circuit Court of Appeals have held that, where there is a failure to provide a Federal employee with his appeal rights as guaranteed by 5 C.F.R. § 1201.21, this, in itself, requires reversal of the Agency's decision that was appealable and for which no right of appeal was ever provided. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

The failure to provide a Federal employee, the petitioner in this case, with his appeal rights, in writing, " . . . constitutes an abridgement of his constitutional right to minimum due process of law." *Stephen v. Department of the Air Force*, 47 MSPR 672 (1991). Where such

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[4] These issues, while briefed and argued extensively, were never addressed by the MSPB or by the lower Court. The Administrative Judge, however, did briefly touch on these issues in his opinion. (A-71.)

harmful procedural error likely had a harmful effect upon the outcome of the case, the reversal of the Agency's action is mandatory. *Shiflett v. U.S. Postal Service*, 839 F.2d 669 (Fed.Cir. 1988).

It is undisputed that the petitioner in the instant matter gave notice of the breach of the original resignation settlement agreement to the Agency as early as March of 1987 when he notified the then regional counsel that the investigative files that had been generated and agreed to be kept confidential were admittedly given to another Agency employee, Mr. Grubka. Then the petitioner attempted to rescind his resignation and had voluminous correspondence with the Agency about the breach of the Agreement. (A-70, 71, 86-88.) It is uncontroverted that the Agency never provided the petitioner with his appeal rights to the MSPB after the Agency had denied the petitioner's request for relief. (A-70, 71.)

The Agency's failure to provide the petitioner with his rights as guaranteed by 5 C.F.R. § 1201.21 is, in fact, "harmful error" under 5 U.S.C. § 7701(c)(2)(A). This type of "harmful error" has been defined by this Court as being that type of error that "substantially prejudiced" the petitioner's rights effecting the Agency's decision. *Cornelius v. North*, 472 U.S. 648 (1985). Reversal of an action taken by the Agency for "harmful error" is warranted where the "procedural error" likely had a harmful effect upon the outcome of the case before the Agency. See, *Shiflett v. U.S. Postal Service, supra*. Nothing could be more harmful than the fact that the errors of the Agency herein resulted in the petitioner's removal from the Internal Revenue Service without remedy for many years.

The lower Court simply ignored these due process issues.

By failing to address these issues and allowing them to remain unresolved, the lower Court, and the MSPB have deviated from appropriate legal standards and have simply ignored existing legal precedent regarding protection of the petitioner's rights to due process under law. This is especially true where the facts are undisputed by the Agency with regards to their utter failure to provide the petitioner with any advice or notice, under law, after taking adverse action against him or when he gave specific oral and written notice that he felt that the retirement agreement had become involuntary, as a matter of law. (A-71.)

The fact that the Court below has ignored this vital constitutional and statutory issue of due process is exactly the type of special and important reason why this Court should grant the petitioner's Petition for Writ of Certiorari.

III. THE LOWER COURT IGNORED THE LEGAL IMPACT OF THE PETITIONER'S ATTEMPT TO RESCIND HIS RESIGNATION BEFORE THE EFFECTIVE DATE OF THE SAME.

Upon realizing that the resignation agreement had been breached by the Agency, the petitioner gave written notice to rescind said resignation prior to the effective date thereof. (A-84.) While the Agency responded (A-85), said response was not in compliance with the specific requirements of 5 C.F.R. § 715.202(b) which states that an

Agency must accept said rescission so long as it is tendered prior the effective date. The only exception is if the Agency has a valid reason not to accept the same *and* explains that to the employee. 5 C.F.R. § 715.202(b). The Agency utterly failed to do this, thus depriving the petitioner of his right to return to work. (A-85.)

Numerous letters were exchanged between the petitioner and various authorities at the Agency. (A-84-88.) After the petitioner submitted his rescission letter (A-84) to Mr. Matthews, however, Mr. Matthews responded (A-85) by simply stating that since the post-dated resignation agreement was already on record, no rescission would be accepted. (A-85.) This abrupt response was wholly inadequate and unlawful under the requirements noted in 5 C.F.R. § 715.202(b). Said regulation *requires* that Mr. Matthews not only have a valid reason for not accepting said rescission, but that he explain it as well. Mr. Matthews ignored this regulation entirely in his letter. (A-85.)

This failure requires that said rescission be accepted retroactive to June 14, 1987.

CONCLUSION

For the foregoing reasons, this Court should grant Certiorari and determine the issues noted above so as to correct the departure from established precedent by the Court below.

Respectfully submitted,

Petitioner,
By his attorney,

BURTON A. NADLER
BBO# 366340
PETRUCELLY & NADLER, P.C.
One Court Street, Suite 1000
Boston, MA 02108
(617) 720-1717

Dated: May 21, 1993

APPENDIX

1. Order denying Petition for Rehearing from U.S. Court of Appeals for the Federal Circuit.....A-1

2. Judgment of the United States Court of Appeals for the Federal Circuit.....A-3

3. Opinion and Order of the Merit Systems Protection Board..... A-10

4. Initial Decision of Administrative Judge of Merit Systems Protection Board.....A-27

5. Exhibits.....A-77

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-3207

DAVID A. GOODWIN,

Petitioner,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

FOR THE COURT,
FRANCIS X. GINDHART,
CLERK

Dated: February 23, 1993

By /s/ Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: BURTON A. NADLER
BRAD FAGG

GOODWIN V TREASURY, 92-3207
(MSPB - NY07529010477)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-3207

DAVID A. GOODWIN,

Petitioner,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S). NY07529010477

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED DEC 18 1992

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

COSTS: Against, Petitioner.

PRINTING----------$342.48

TOTAL----------$342.48

ISSUED AS A MANDATE: January 8, 1993

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-3207

DAVID A. GOODWIN,

Petitioner,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

DECIDED: December 18, 1992

Before MICHEL, *Circuit Judge*, SKELTON, *Senior Circuit Judge*, and CLEVENDER, *Circuit Judge*.

SKELTON, *Senior Circuit Judge*.

Appellant David A. Goodwin petitions for judicial review of the decision of the Merit Systems Protection Board (the board) dated December 20, 1991, Docket No. NY07529010477, in which the board held that it did not have jurisdiction of appellant's appeal because he had voluntarily resigned from his position of Chief, Examination Branch, GM-15, with the Internal Revenue Service (the agency) in Buffalo, New York, effective June 16, 1987. We affirm for reasons set forth below.

Soon after appellant's attendance at an off-site, off-duty, after-hours Halloween party with some agency trainees, an anonymous report was made to the Buffalo District Director, Gary Matthews, regarding alleged misconduct of appellant at the party. Appellant was placed

on special assignment by Matthews at the agency's Hamburg, N.Y. post of duty on or about December 8, 1986, pending an investigation into the allegations of appellant's misconduct.

On or about December 23, 1986. Matthews told appellant that the agency intended to propose appellant's demotion for misconduct unless he agreed to choose a voluntary demotion. From that date to January 29, 1987, appellant and his then attorney Philip Abramowitz negotiated with the agency to determine whether a settlement agreement could be reached whereby appellant would resign in exchange for a "clean record". These negotiations culminated in an oral agreement as follows:

(1) The appellant would resign after exhausting his accumulated sick leave:

(2) The agency would provide him with a "clean personnel record";

(3) The parties would agree on a letter of reference from the IRS District Director Gary Matthews; and

(4) The agency would publish in its local employee newspaper the appellant's stated personal reason for resigning.

Pursuant to this agreement, appellant submitted his resignation dated January 29, 1987, as follows:

> I, David Goodwin, Chief Examination Division, Buffalo District, hereby resign from the Internal Revenue Service unconditionally and irrevocably upon termination of my accrued sick leave but no later than July 1, 1987.

The District Director Gary Matthews furnished a letter of reference to appellant in accordance with the agreement, and Standard Form (SF) 50, Notification of Personnel Action, showing that appellant had resigned effective June 16, 1987, was issued by the agency. We assume that the publication was made in the employee newspaper as required by provision (4) of the agreement, although there is nothing in the record about it. In any event, appellant has not raised any issue regarding it.

The agency filled appellant's vacant position on March 2, 1987. Notwithstanding this fact, the appellant wrote a letter, dated June 4, 1987, to Matthews attempting to rescind his resignation before it became effective on June 16, 1987. Matthews denied the request in a letter dated June 15, 1987. The board held that this denial was proper since appellant's position had been filled, citing 5 C.F.R. § 715.202(b) and two prior board decisions.

After his resignation, appellant obtained a position in the private sector working in a real estate firm. In the meantime, appellant submitted an application for enrollment to practice tax matters before the agency to Leslie A. Shapiro, the Director of Practice of the agency whose duty was to adjudicate such applications, and by so doing either allow or disallow them. Shapiro inquired of Matthews on November 10, 1987, as to appellant's fitness to practice before the agency, and Matthews responded on December 9, 1987, in a memorandum which stated:

> In response to your November 10, 1987, inquiry concerning Mr. Goodwin's application, I strongly oppose his proposed enrollment. I think it is important to understand that Mr.

> Goodwin resigned in the face of an administrative investigation which would have likely resulted in an adverse action against Mr. Goodwin.

At the time of the initial hearing of this case, Mr. Shapiro had not issued a decision on the application. It is clear that both Shapiro and Matthews were employees and officials of the agency.

In his appeal, appellant alleged, inter alia: (1) that he lacked the mental capacity due to intoxication to submit his resignation; (2) that the agency obtained his resignation through coercion and duress; and (3) that the agency breached the terms of the oral settlement agreement and extracted appellant's resignation through deception when Matthews sent Shapiro the December 9, 1987, memorandum strongly recommending against appellant's application for enrollment to practice before the agency, thereby rendering the agreement invalid. Appellant requested the board to declare the settlement agreement void, and that he be restored to his former position with back pay and other benefits to which he should be entitled.

The case was assigned to an administrative judge (AJ) who conducted a trial and at its conclusion made certain findings, and entered a judgment in favor of the appellant, as described below.

The AJ found, inter alia, that the parties had made the oral settlement agreement in exchange for appellant's resignation; that appellant had the mental capacity to make the agreement; that the agency did not obtain appellant's resignation through coercion or duress; that

the agency breached the terms of the settlement agreement and obtained appellant's resignation through deception when Matthews sent Shapiro the memorandum recommending that the appellant's application for enrollment be denied because appellant had resigned in the face of an investigation which would likely have resulted in an adverse action, thereby indicating that appellant resigned with pending charges against him; that the Matthews memorandum breached the terms of the agreement that provided that the agency would provide appellant with a "clean personnel record"; and that because of this breach of the agreement by the agency, appellant's resignation was involuntary. Based on these findings, none of which were contested or objected to by the appellant, the AJ rendered judgment for appellant reversing the agency's action, and ordering that appellant be retroactively restored to his position with back pay and other benefits to which he was entitled.

Both parties petitioned the full board for review. The board, with one member dissenting, denied appellant's petition, and granted the petition of the agency. The board then reviewed the decision of the AJ, and held that it did not have jurisdiction over the appeal because appellant failed to show that the agency intended not to fulfill or breached the terms of the settlement agreement, thereby making his resignation involuntary. Implicit in this holding is that appellant's resignation was voluntary, which deprived the board of jurisdiction. The board held further that no error was committed by the agency when Matthews sent his memorandum to Shapiro.

The appellant has appealed to this court. Appellant says that the settlement agreement was breached when

Matthews sent his memorandum to Shapiro recommending that appellant not be enrolled to practice tax matters before the agency. Appellant argues that he was promised a "clean personnel record" and that Matthews' memorandum was contrary to that promise, and therefore the agreement was breached and no longer valid and, consequently, his resignation was involuntary. We do not agree. Matthews was the district director and participated in both the settlement and the investigation. Shapiro was the agency's Director of Practice. Because Matthews and Shapiro were both employees and officers of the agency, we conclude that the memorandum to Shapiro was an internal communication within the agency from one officer to another as a part of the routine and on-going business of the agency. The contents of the memorandum were not revealed nor made known by the agency to anyone outside of the agency. Under these circumstances, it is our view that it was proper for Matthews to send the memorandum to Shapiro, and that the agency did not breach the terms of the settlement agreement based on Matthews' statement. We have considered the other arguments raised on appeal by appellant and find them to be without merit. Accordingly, we hold that the settlement agreement was valid and binding on the parties, was complied with and performed by the agency, appellant's resignation was voluntary, and the board did not have jurisdiction of his appeal. The decision of the board is

AFFIRMED.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DAVID A. GOODWIN, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBER NY07529010477 DATE: DEC. 20, 1991

Burton A. Nadler, Esquire, Petrucelly & Nadler, P.C., Boston, Massachusetts, for the appellant.

Eileen P. Collins, Esquire, New York, New York, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

Vice Chairman Amador issues a dissenting opinion.

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review and the agency's petition for review of the October 25, 1990 initial decision that found that the appellant's separation could not be sustained. For the reasons discussed below, the Board DENIES the appellant's petition for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board GRANTS the agency's petition for review under 5 C.F.R.

§ 1201.115(c)(2), REVERSES the initial decision, and DISMISSES the petition for appeal for lack of jurisdiction.

BACKGROUND

Until his resignation effective June 16, 1987, the appellant was employed as Chief of the Internal Revenue Service's Enforcement Division in Buffalo, New York. On May 16, 1990, the appellant filed with the Board's New York Regional Office a petition for appeal in which he alleged that his resignation was involuntary. In a July 3, 1990 initial decision, the administrative judge, pursuant to the parties' stipulation, dismissed the appeal without prejudice subject to the appellant's refiling of his appeal within 30 days of the date of the initial decision. *See* Initial Decision at 1 n.1, 32; *Goodwin v. Department of the Treasury*, MSPB Docket No. NY07529010327 (Initial Decision, July 3, 1990).

The appellant refiled his petition for appeal on July 26, 1990. *See* Appeal File, Tab 1. In his petition for appeal and supporting submissions, the appellant challenged the validity of his resignation. He contended, inter alia,[1] that

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[1] Because he found that the appellant's resignation was involuntary based on other grounds, the administrative judge declined to address the appellant's contentions that the agency improperly refused to allow him to withdraw his resignation before its effective date, and that the resignation was invalid because it was conditional. *See* Initial Decision at 30 n.8. The appellant has not pursued these contentions on review.

We find that the appellant's resignation was not involuntary because of the agency's refusal to permit him to withdraw it before its effective date and that the resignation was not conditional. The record indicates that the agency filled the

the agency breached the terms of the parties' oral agreement that the appellant would resign from his position in exchange for a "clean personnel record," by disclosing to another employee under investigation and to the agency's Director of Practice (DOP), to whom the appellant had subsequently applied for enrollment to practice before the IRS, that the appellant had resigned under cloud of an investigation into certain acts of misconduct he had allegedly committed. The appellant also contended that good cause existed for the untimely filing of his petition for appeal because the agency failed to notify him of his right to appeal to the Board from the alleged involuntary resignation. *See* Initial Decision at 4-5.

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appellant's position on March 2, 1987, prior to his June 4, 1987 request for withdrawal. *See, e.g.*, Appeal File, Tab 6, Subtabs 1, 4M, and Tab 10, Subtabs C, D. Thus, the agency acted properly in refusing the appellant's request to withdraw his resignation. *See* 5 C.F.R. § 715.202(b); *Einstein v. Department of the Army*, 26 M.S.P.R. 404, 407-08 & n.1 (1985); *see also Greene v. Department of Health and Human Services*, 48 M.S.P.R. 161, 165-66 (1991). Because the appellant's resignation was not involuntary based on the agency's refusal to allow him to withdraw it, the Board lacks jurisdiction over the appellant's appeal on this ground. *See Einstein*, 26 M.S.P.R. at 407-08 & n.1. We further find that the appellant's resignation was not conditional and, thus, invalid under agency regulation IRM (Internal Revenue Manual) 0715.4(3), which provides that a resignation based on an employee's statement of conditions is unacceptable. *See* Appeal File, Tab 34. Rather, the appellant's resignation states that he resigned "unconditionally and irrevocably upon termination of [his] accrued sick leave but no later than July 1, 1987." *See id.*, Tab 6, Sub 4N. Therefore, the appellant's resignation was also not involuntary and within the Board's jurisdiction based on this contention.

The administrative judge found that the parties had entered into an oral agreement. He reviewed the terms of the agreement for the limited purpose of determining whether the Board had jurisdiction over the appeal because of any agency action that rendered the resignation involuntary.[2] The administrative judge found, inter alia, that, in January 1987, the parties entered into an oral agreement that provided that: (1) The appellant would resign after exhausting his accumulated sick leave; (2) the agency would provide him with a "clean personnel record"; (3) the parties would agree on a letter of reference from IRS District Director Gary Matthews; and (4) the agency would publish in its local employee newspaper the appellant's state reason for resigning. Initial Decision at 24-25.

Contrary to the appellant's contention, the administrative judge found that the agency did not agree to destroy the investigative file in the appellant's case. In this regard, the administrative judge relied on testimony that the agency needed the investigative file in connection with a demotion action involving another employee who was allegedly involved in the same misconduct as the appellant. *Id.* at 25-26. Nevertheless, the administrative judge found that the agency breached the terms of the parties' oral agreement because Mr. Matthews sent to the DOP a memorandum "strongly" recommending

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[2] The Board has held that it lacks the authority to enforce the terms of a settlement agreement that was not submitted into the record for enforcement purposes in a matter over which the Board has jurisdiction. *See Gaither v. Department of Justice*, 444 M.S.P.R. 221, 223 (1990); *Danelishen v. United States Postal Service*, 43 M.S.P.R. 376, 379-80 (1990).

against granting the appellant's application for enrollment to practice before the IRS based on the investigation, which Mr. Matthews stated would likely have resulted in an adverse action against the appellant had he not resigned. *Id.* at 26-27. The administrative judge concluded that the agency obtained the appellant's resignation through deception because it had agreed that, in exchange for the resignation, it would provide the appellant with a clean record, which the administrative judge found required the appellant's personnel records to reflect that he resigned for personal reasons without reference to pending charges of misconduct. The administrative judge determined that, even if Mr. Matthews honestly believed that providing a clean record to the appellant did not preclude him from making the statement in his memorandum, the agency's promise to provide the appellant with a clean record was a misrepresentation because the agency withheld material information from the appellant by not revealing to him that it could disclose the circumstances of his resignation. *Id.* at 29-30. Thus, the administrative judge determined that the Board had jurisdiction over the appeal. *Id.* at 30.

The administrative judge then waived the time limit for filing the petition for appeal. He found that there was good cause for the untimeliness under *Shiflett v. United States Postal Service*, 839 F.2d 669, 674 (Fed. Cir. 1988), as well as under *Ricci v. Veterans Administration*, 40 M.S.P.R. 113, 116 (1989), and other Board decisions, because the agency failed to inform the appellant of his right of appeal to the Board after the appellant placed it on notice, as early as March 1987, and also on subsequent occasions, that he considered his resignation to be

invalid. Initial Decision at 34-35. The administrative judge did not sustain the appellant's resignation. *Id.* at 35-36.

The appellant has filed a "limited" petition for review of the initial decision.[3] The agency has also filed a petition for review,[4] contending, inter alia, that the administrative judge erred by exceeding his authority in modifying the terms of the parties' oral agreement. The appellant has responded to the agency's petition for review.[5]

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[3] The appellant's petition for review does not challenge any of the administrative judge's findings of law or fact. Rather, it merely points out certain typographical errors in the initial decision, i.e., that the administrative judge stated that "the appeal," rather than the agency action was "reversed," and that, on page 29 of the initial decision, the administrative judge used the word "representation" rather than "resignation." A review of these errors shows that they are merely technical and do not constitute a basis for granting the appellant's petition for review. *See* 5 C.F.R. § 1201.115(c).

[4] The agency asserts that it has not afforded the appellant interim relief because his resignation became effective on June 16, 1987 (prior to the July 9, 1989 effective date of the Whistleblower Protection Act (WPA) of 1989, that provides for interim relief). *See* 5 C.F.R. § 1201.115(b). The appellant has not asserted his entitlement to interim relief, and we agree that he is not entitled to such relief under the WPA.

[5] In December 5, 1990 notices, the Board informed the parties that the record would close when the time for filing responses to the petitions for review, or cross-petitions for review, had passed, and that additional submissions would not be considered absent a showing that they were based on new and material evidence that was not available before the record closed. *See* Petition for Review (PFR) File, Tab 3. In a December 28, 1990 letter to the Board, the agency requested an extension of

ANALYSIS

The Board lacks jurisdiction over the appeal because the appellant has not shown that his resignation was involuntary.

A settlement agreement is a contract, and, in construing it, the Board must first examine the agreement itself to determine the parties' intent. The Board cannot unilaterally modify the material terms of a settlement agreement. *Harrison v. Veterans Administration*, 44 M.S.P.R. 594, 599 (1990); *see also Putnam v. Department of Housing and*

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time to January 7, 1991, within which to reply to the appellant's response to its petition for review. *Id.* at Tab 5. It filed its reply on January 4, 1991. *Id.* at Tab 7. By letter dated December 31, 1990, the appellant requested that the Board deny the agency's request. *Id.* at Tab 6. The appellant subsequently moved to strike the agency's reply and requested sanctions against the agency in the form of $1,000.00 in attorney fees. *Id.* at Tab 8. The agency responded to the appellant's motion for sanctions, contending that its submission of the reply to the appellant's response did not violate Board regulations and that there is no basis on which to grant the sanctions requested by the appellant. *Id.* at Tab 10.

We DENY the agency's request to reply to the appellant's response to its petition for review. Because the agency filed its December 28, 1990 and January 4, 1991 submissions after the deadline set forth in the Board's December 5, 1990 notice, it was required to show that its submissions were based on new and material evidence that was not available when the record closed. *See* 5 C.F.R. § 1201.114(i); PFR File, Tab 3. We find that the agency has not made this showing inasmuch as a review of the agency's submissions indicates that they merely expand on previous arguments. Therefore, we will not consider them.

As to the appellant's request for sanctions in the form of attorney fees, we DENY this request in view of our finding that the Board lacks jurisdiction over the appeal.

Urban Development, 44 M.S.P.R. 533, 535 (1990). Furthermore, a resignation, predicated on an agency promise that it actually did not intend to fulfill, is involuntary, and the Board has jurisdiction over it. *See Wobschall v. Department of the Air Force*, 43 M.S.P.R. 521, 523, *aff'd*, 918 F.2d 187 (Fed. Cir. 1990) (Table); *Danelishen v. United States Postal Service*, 43 M.S.P.R. 376, 380 (1990). We find, however, that the Board lacks jurisdiction over the instant appeal because the appellant has failed to show that the agency intended not to fulfill or breached the terms of the settlement agreement, thereby making his resignation involuntary.

The agency contends that, in agreeing that the appellant would resign with a "clean personnel record," or a "clean record," the agency meant that the appellant's official personnel file would not reflect that he resigned pending charges of misconduct. Petition for Review (PFR) at 8-9, PFR File, Tab 2. The agency argues that the administrative judge erred by interpreting that the term of the agreement to mean that the agency was precluded from ever disclosing the circumstances surrounding the appellant's resignation, even within the agency. It contends that the administrative judge's interpretation is inconsistent with his findings that the parties' agreement did not require destruction of the investigative file and that the agency's release of the investigative file to the other employee involved in the same alleged misconduct did not violate the settlement agreement. *Id.* at 12-13.

We agree with the administrative judge's finding that the agency did not breach the terms of the settlement agreement when it released information regarding the investigation to the other employee who was allegedly

involved with the appellant in the misconduct being investigated. The employee would have already been aware of the circumstances surrounding the appellant's resignation. Furthermore, because the agency was involved in a demotion action against that employee based on the same investigation, both the agency and the employee would have required access to the investigative file.

As to the alleged breach of the settlement agreement by Mr. Matthews, the agency contends that the appellant did not assert in his prehearing submissions that Mr. Matthews improperly disclosed in his memorandum to the DOP the circumstances of his resignation and that, rather, he contended that the agency breached the parties' agreement by disclosing the investigative file to the other employee concerned and to the DOP. The administrative judge found that the appellant raised the issue of Mr. Matthews's memorandum in his pleadings and at the hearing. *See* Initial Decision at 27-28. Our review of the record indicates that, while the appellant did not specifically raise the issue of Mr. Matthews's memorandum in his pleadings and prehearing submissions, he alleged, in a June 20, 1990 prehearing submission, that the agency breached the settlement agreement "by allowing Mr. Matthews to give not only negative, but, in fact, slanderous opinions about the appellant to other parties in the Internal Revenue Service." *See* MSPB Docket No. NY07529010327, Appeal File, Tab 10.

We find, however, that the appellant has failed to show that the agency breached the terms of the settlement agreement based on Mr. Matthews's statements. Mr. Matthews's statements to the DOP were not based on the

appellant's personnel record but, rather, were based on his own memory. We note that Mr. Matthews was directly involved with the settlement negotiations and perhaps should have been more cautious in disclosing information regrading the appellant's employment. We also note, however, that the other employee who was allegedly involved with the appellant in the misconduct knew the allegations of misconduct against the appellant and could have shared the information with anyone. Likewise, anyone having access to the investigative file could have disclosed the information. There is no indication that the parties agreed to terms to avoid such disclosure, e.g., that a specific person, identified by name or title, was designated to handle all employment inquiries regarding the appellant, or that only precise agreed-upon language would be used in responding to requests for such inquiries. *See, e.g., Miller v. Department of Health and Human Services,* 41 M.S.P.R. 385, 386-88, 391-92 (1989). A mere reference to a "clean personnel record" does not require an agency "to guarantee non-disclosure in any form." *Fuller v. United States Postal Service,* 45 M.S.P.R. 611, 614 (1990).

Under these circumstances, the agency could not have prevented an intra-agency disclosure even if it had wanted to do so. To adequately advise someone that he is not to disclose certain information, that individual must be made aware of the information that is not to be disclosed. *See Miller,* 41 M.S.P.R. at 386-88, 391-92. Because, in the instant appeal, Mr. Matthews was not apprised of the specific information he was not to disclose, his statements to the DOP did not constitute an agency breach of the settlement agreement.

Accordingly, the Board lacks jurisdiction over this appeal.

ORDER

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: /s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF VICE-CHAIRMAN AMADOR

I would find that the appellant's resignation was involuntary because the settlement agreement was invalid, having been obtained through the agency's deception. Assuming, arguendo, however, that the parties entered into a valid settlement agreement, I would find in the alternative that the appellant's resignation was involuntary because the agency breached a material term of that agreement.

The Board has held that it may examine the circumstances surrounding a settlement agreement, not entered into the record, when considering whether the appellant's resignation was involuntary. *See, e.g., Danelishen v. United States Postal Service*, 43 M.S.P.R. 376, 380 (1990). A resignation need not be coerced to be involuntary it is also involuntary if it is obtained by agency misinformation or deception. The touchstone is whether the employee made an informed choice. *See Covington v. Department of Health & Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984). There is no requirement that an employee be deceived intentionally about his employment options, it being sufficient that the employee shows that a reasonable person would have been misled by the agency's statements. *Id.*, citing *Scharf v. Department of the Air Force*, 710 F.2d 1572 (Fed. Cir. 1983).

The terms of the oral settlement agreement provided that the appellant would resign effective June 16, 1987, after exhausting his accrued sick leave; the agency, in turn, would furnish the appellant with a "clean record" and a positive letter of reference from Mr. Matthews, the

Buffalo District Director for the Internal Revenue Service, and it would permit the appellant to publish in the local employee newspaper his stated reasons for resigning. When one considers these terms, it is clear that the parties intended to give the appellant a clean record, preserving his professional reputation, in order to facilitate his job search by providing favorable information regarding his employment with the agency. *See, e.g., Miller v. Department of Health and Human Services*, 41 M.S.P.R. 385, 391 (1989). I would find that the parties reasonably understood that the intent of the oral settlement agreement was to preclude disclosure of the circumstances leading to the appellant's resignation and to facilitate his ability to obtain other employment.

The agency claims, however, that the scope of the settlement agreement was limited by regulatory requirements, specifically 31 C.F.R. § 0.735.55. The agency contends that the regulation obligated the appellant's former supervisor to disclose all facts concerning the appellant's resignation to its Director of Practice (DOP) after the appellant had applied to practice before him. *See* Agency's Petition for Review (PFR) at 15-17; IAF, Tab 27. the agency also maintains that the appellant was aware of the limited scope of the agreement, i.e., that the plain meaning of a "clean record" did not encompass any information disclosed to agency officials. PFR at 13-14.

I would disagree. There is no evidence that the appellant was aware of the agency's alleged lack of authority to comply with the settlement agreement in response to an intra-agency inquiry or of the agency's professed belief that the agreement did not apply to such inquiries. Assuming arguendo that its regulations required the

agency to inform the DOP of the circumstances behind the appellant's resignation, I would find that the agency deceived the appellant when it entered into the settlement agreement because it did not inform the appellant of this limitation.

It is well settled, of course, that a settlement agreement is a contract which may be invalidated by evidence of coercion, wrongful conduct, fraud, misrepresentation, or mutual mistake in arriving at the agreement. *See, e.g., Moran v. Veterans Administration,* 43 M.S.P.R. 547, 552 (1990); *Hightower v. Department of Trasnportation* [sic], 39 M.S.P.R. 538, 541 (1989). The agency's deception, even if unintentional, thus rendered involuntary the appellant's resignation which was submitted in reliance upon the agency's promise of a "clean record." *See Covington,* 750 F.2d at 942.

Even if we assume, however, that the settlement agreement here was a valid contract, I would find that the appellant's resignation was involuntary because the agency did not honor the terms of the settlement agreement. *See Wobschall v. Department of the Air Force,* 43 M.S.P.R. 521, 523-24 (1990). Thus, I find without merit the agency's claim that it complied with terms of the oral settlement agreement and gave the appellant a "clean personnel record" when it merely gave the appellant two clean personnel documents – a form SF-50 stating that he had given no reason for his resignation and a personal letter of recommendation signed by the Buffalo District Director. *See* Initial Appeal File (IAF), Tab 6, Subtab 4H, 4O. In fact, later than year, Mr. Matthews, in response to the intra-agency inquiry from the DOP about the appellant's professional qualifications, did not conform to the

contents of the agreement but responded with a critical memorandum in which he disclosed the circumstances behind the appellant's resignation. Since Mr. Matthews was a party to the settlement negotiations and was the author of both the letter of recommendation and the memorandum, his was not an unintentional or inadvertent oversight to the negotiated terms. Not only did Mr. Matthews not conform to the contents of the agreement but, as the administrative judge found, he speculated that the agency was likely to bring an adverse action against the appellant. Initial Decision at 27. In so speculating, I would find that Mr. Matthews went beyond providing accurate background information and substituted his personal opinion. Thus, I would find that the agency breached the plain, unambiguous terms of the settlement agreement upon which the appellant relied. *See Miller,* 41 M.S.P.R. at 391-92. Since the appellant resigned in reliance upon the agency's statements, his resignation is deemed involuntary. *See Scharf,* 710 F.2d at 1574-75.

Having determined that the Board has jurisdiction over this appeal, I would next find that the administrative judge correctly applied the Federal Circuit's decision in *Shiflett v. U.S. Postal Service,* 839 F.2d 669, 670-74 (Fed. Cir. 1988), when he concluded that the appellant had shown good cause for his delay and for waiver of the filing deadlines. Initial Decision at 33-36.

For the above reasons, I respectfully dissent.

DEC 20 1991
(Date)

/s/ Antonio C. Amador
Antonio C. Amador
Vice-Chairman

CERTIFICATE OF SERVICE

I certify that this OPINION AND ORDER was sent today: By certified mail to:

Burton A. Nadler, Esquire
Petrucelly & Nadler, P.C.
One Court Street, Suite 1000
Boston, MA 02108

By regular mail to:

David A. Goodwin
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Dover, NH 03820

Eileen P. Collins, Esquire
Department of the Treasury
Internal Revenue Service
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Marjorie Marks
Employee Relations Division
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New York Regional Office
Merit Systems Protection Board
26 Federal Plaza, Suite 3137-A
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By hand to:

Office of Special Counsel
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DEC 20 1991
(Date)

Washington, D.C.

/s/ Barbara Satcher
for Robert E. Taylor
Clerk of the Board

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK REGIONAL OFFICE

DAVID A. GOODWIN, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBER NY07529010477 DATE: October 25, 1990

Burton A. Nadler, Esquire, Boston, Massachusetts, for the appellant.

Eileen P. Collins, Esquire, New York, for the agency.

BEFORE

Arthur Joseph
Administrative Judge

INITIAL DECISION

INTRODUCTION

Appellant refiled his appeal[1], alleging that he involuntarily resigned from the competitive service position of Program Manager (Chief, Examination Division), GM-15, at the Internal Revenue Service's Buffalo, New York District Office, and requesting a hearing. Because he was not serving a probationary period and raised a nonfrivolous

[1] Appellant's initial appeal was dismissed without prejudice pursuant to the parties' joint stipulation. *Goodwin v. Department of the Treasury*, MSPB Docket No. NY07529010327, slip op., at 2 (Initial Decision, Jul. 3, 1990). Appellant refiled his appeal within the time limits set forth in the parties' joint stipulation.

claim that resignation was involuntary, a hearing was held on September 10, 1990. *See Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 894 (Fed. Cir. 1986). For the reasons below, the appeal is REVERSED.

BACKGROUND

Appellant had about nineteen years of more than satisfactory service with the Internal Revenue Service before resigning from the position of Chief, Examination Branch, GM-15, effective June 16, 1987. Indeed, he received an overall outstanding rating in his last performance appraisal in or about October 1986, as well as a cash performance award.

On or about December 8, 1986, the then Buffalo district Director Gary Matthews,[2] orally informed appellant the [sic] he was being placed on special assignment at the agency's Hamburg, New York post-of-duty (POD), pending the completion of an investigation into allegations that appellant engaged in misconduct during a Halloween party in 1986. On or about December 23, 1986, Mr. Matthews orally informed appellant that the agency intended to propose appellant's demotion for misconduct unless appellant agreed to chose a voluntary demotion.

From late 1986 through early 1987, Philip Abramowitz, Esquire, represented appellant and was authorized to determine whether a settlement agreement

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[2] Mr. Matthews was reassigned from his position at the agency's Buffalo District Office to the position of District Director with the agency's Philadelphia District Office sometime after appellant's resignation was effectuated.

could be reached whereby appellant would resign in exchange for, inter alia, a "clean record" During that period, the parties engaged in settlement negotiations, culminating in appellant's submission of a written resignation dated January 29, 1987, based on the parties' belief that they had reached an oral agreement. In his resignation, appellant stated the following:

> I, David Goodwin, Chief, Examination Division, Buffalo District, hereby resign from the Internal Revenue Service unconditionally and irrevocably upon termination of my accrued sick leave but no later than July 1, 1987.

As part of the agreement, Mr. Matthews provided appellant with a letter of recommendation dated January 29, 1987. The agency subsequently issued a Standard Form (SF) 50, Notification of Personnel Action, documenting that appellant had resigned, effective June 16, 1987. That document, which was placed in appellant's official personnel file, contains no reference to any pending investigation into allegations that appellant engaged in misconduct.

By letter dated June 4, 1987, addressed to Mr. Matthews, appellant attempted to rescind his resignation and requested six days advance sick leave. In response, Mr. Matthews issued a June 15, 1987 letter, denying appellant's request and stating that the effective date of the resignation would not be postponed. Enclosed with that letter was a copy of the SF-50 documenting appellant's resignation.

Appellant subsequently wrote letters to the agency concerning the agency's refusal to permit appellant's

rescission of his resignation. He alleged that Mr. Matthews had acted improperly in obtaining and refusing to accept the withdrawal of the former's resignation. In response, the agency informed appellant that it believed that the agency's action was proper. It did not, however, inform appellant that he had a right to appeal the Board if he believed his resignation was involuntary.

After his resignation, appellant filed an application with the agency's Director of Practice seeking authorization to practice before the agency. In an April 4, 1988 letter, appellant informed the Director of Practice that he was the subject of an "administrative review" concerning a conduct-related matter before his resignation but that he resigned "strictly for personal enhancement reasons." He also stated that his attorney was preparing a law suit against Mr. Matthews.

Appellant subsequently retained, Burton Nadler, Esquire, his current representative to file a civil suit. On or about December 28, 1988, Mr. Nadler filed a civil action in United States District Court for the District of New Hampshire, claiming, inter alia, that appellant was constructively and wrongfully terminated due to Mr. Matthews's refusal to grant appellant's request to rescind his resignation. Agency File, Tab 5C. By motion to dismiss dated May 3, 1989, the United States Attorney's Office for the District of New Hampshire, argued, in relevant part, that those counts of the complaint relating to appellant's allegation of wrongful termination should be dismissed because appellant had failed to file an appeal exhausting his administrative remedies before the Board. *Id.* at Tab 5B, Memorandum in Support of Motion to Dismiss. The documents submitted to the court contain a certificate of

service certifying the motion was served on Mr. Nadler. Incorporated into the motion to dismiss was a declaration under penalty of perjury from Elliot Carlin, an attorney in the agency's Regional Counsel's Office, stating that appellant's claim that his resignation was involuntary is a matter that should be determined by the Board and that appellant has failed to file an appeal with the Board. *Id.* at 5b. On or about June 7, 1989, Mr. Nadler filed an amended complaint eliminating his original counts relating to his constructive and wrongful termination claims and included a new count alleging constitutional violations relating, in part, to Mr. Matthews's decision not to permit appellant to rescind his resignation. *Id.* at Tab 5A.

On May 16, 1990, appellant filed his appeal with the Board alleging, inter alia: (1) that appellant lacked the mental capacity to submit his resignation; (2) that the agency obtained his resignation through coercion and duress; (3) that the agency violated the terms of the parties' oral settlement agreement by providing one James Grubka with the unsanitized investigation file in appellant's case and, thus, obtained appellant's resignation through deception; (4) that agency violated 5 C.F.R. § 715.202(b) (1987) by denying appellant's request to withdraw his resignation before the effective date; (5) that the resignation was invalid under Internal Revenue Manual (IRM) § 0714.4(3) (1980) because it was conditional; (6) that the agency forced appellant to resign because of his quality initiative program; and (7) that the agency failed to provide him with appeal rights to the Board regarding his resignation and, therefore, good cause exists for his delay in filing his appeal.

ANALYSIS AND FINDINGS

1. Appellant must prove by preponderant evidence that his resignation was involuntary to establish the Board's jurisdiction over his appeal and to prevail on the merits.

As a general rule, a resignation is presumed to be a voluntary action and, thus, not appealable to the Board. *See Latham v. U.S. Postal Service*, 909 F.2d 500, 503 (Fed. Cir. 1990); *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975). However, an ostensibly voluntary resignation obtained by agency through coercion, duress, or deception or appellant's lack of mental capacity is tantamount to a removal action over which the Board has jurisdiction under 5 U.S.C. § 7513 (d) (West Supp. 1990). *Id.* The Board's jurisdiction and the merits of an alleged involuntary resignation are intertwined in that if appellant proves his resignation was involuntary, the Board has jurisdiction and the agency's action must be reversed because the agency failed to accord appellant his statutory procedural entitlements under 5 U.S.C. § 7513(b) (West. Supp. 1990). *See Schultz v. Department of the Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987); *Beaty v. Department of Agriculture*, 24 M.S.P.R. 658, 662 (1984). Appellant bears the burden of proving by preponderant evidence that his resignation was involuntary. *Id.*

2. Appellant failed to demonstrate by preponderant evidence that he lacked the mental capacity to resign when he submitted his resignation.

Appellant maintained in his pleadings and at the hearing that he lacked the mental capacity to resign when

he tendered his resignation January 29, 1987. To substantiate his claim, he provided testimony about the events which occurred between October 1986 and June 1987, as well as his state of mind during that period. That testimony is summarized below.

In October 1986, he attended a Halloween party at a local hotel during off-duty hours with James Grubka, a subordinate supervisor,[3] and several other agency employees, including female trainees. During the party, appellant consumed alcohol, but he denied being drunk or engaging in sexual harassment.

On or about November 29, 1986, Personnel Officer Robert Doering, of the agency's Buffalo District Office, notified appellant by telephone that the latter was being placed on administrative leave until further notice and should not report for duty. Mr. Doering declined to disclose the reason for the agency's action. Appellant suspected that the agency's action signified that the agency

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[3] The agency took a demotion action Mr. Grubka based on charges of alleged misconduct, stemming from events occurring during the Halloween party. On appeal, the Board issued a decision sustaining the demotion, but the United States Court of Appeals for the Federal Circuit subsequently reversed the Boards's decision and ordered that the agency cancel the demotion. *See Grubka v. Department of the Treasury*, 858 F.2d 1570, 1576 (Fed. Cir. 1988). The Federal Circuit's decision contains a detailed account of the events occurring during the party and also makes reference to evidence about appellant's activities during the party. *Id.* at 1571-75. It is unnecessary to reiterate the court's findings in this case since appellant was not a party to that case. As such, he is not collaterally estopped from disputing the court's factual findings. *See, e.g., Mortensen v. Department of the Army*, 27 M.S.P.R. 433, 437 (1985).

believed he had committed serious misconduct possibly involving a crime.

On or about December 4, 1986, appellant met with Mr. Doering at the agency's Buffalo District Office and was told that he was being assigned to a "special project" at the agency's Hamburg POD until further notice and that he should not discuss the matter with anyone. Shortly thereafter, Mr. Grubka informed appellant by telephone that he too had been indefinitely assigned to the Hamburg POD and that the action was based on allegations that they had engaged in sexual harassment during the off-duty Halloween party in October 1986. The Hamburg POD had about five employees whereas Buffalo District Office had about 850 employees. At that point, appellant, believing that he been sent into "exile" without any justification, began keeping a diary of the events that occurred regarding his status with the agency.

On December 8, 1986, he met with Mr. Matthews, Mr. Doering, and Assistant District Director Curtis Jenkins. During their meeting, Mr. Matthews informed appellant that he was conducting an independent investigation into allegations contained in an anonymous letter that appellant had been drinking and engaging in sexual harassment during the Halloween party. Mr. Matthews directed appellant to report to the Hamburg POD until further notice and not to discuss the matter with anyone. He did not inform appellant who had made the allegations nor afford him an opportunity to provide his account of the matter. Appellant, who had been taking tranquilizers and was "emotionally upset," requested and was granted sick leave beginning that date. Appellant then remained at home and began drinking alcohol. Shortly thereafter,

Barry Weinstein, M.D., an internist, treated appellant for stress and emotional problems by prescribing that he take certain medication. Appellant did not, however, inform the physician that he had been drinking.

On December 11, 1986, Mr. Doering notified appellant by telephone to report to the agency's Buffalo District Office where an agency investigative team would question him about the allegations that he was intoxicated and sexually harassed female employees during the Halloween party. On December 12th, appellant was questioned about those allegations by an investigative team consisting of Eileen P. Collins, the agency's current representative and an attorney in its Regional Counsel's Office, another attorney in its District Counsel's office, and Mr. Jenkins. That team questioned appellant about the allegations but did not reveal who had allegedly accused him of wrongdoing. Appellant specifically denied any allegations that he engaged in any wrongdoing. He was requested but declined to give a written statement.

On December 23, 1986, appellant met with Mr. Matthews, Mr. Jenkins, and Mr. Doering, during which Mr. Matthews announced that after completing his investigation he had lost confidence in appellant's ability as a manager and would formally propose his demotion to a revenue agent position, but Mr. Matthews did not disclose any specific findings. Mr. Matthews indicated that in conducting his investigation, he had spoken with only some of the witnesses at the party. He offered appellant the option of taking a voluntary demotion and warned that if appellant fought the proposed action, the penalty would be harsher and everyone would learn about his "disgraceful conduct" during the party. He further stated

that he would charge appellant with being intoxicated but not sexual harassment. Appellant conceded on cross-examination that during the meeting, Mr. Doering informed appellant of his rights concerning a demotion, including his right to submit a reply to a proposal notice and to appeal a demotion action to the Board. At the end of the meeting, appellant requested and was granted continued sick leave.

Following the December 23th [sic] meeting, appellant decided to resign because he was "upset, devastated, drinking and not thinking clearly." He then hired an attorney, Mr. Abramowitz, to represent him by negotiating a settlement agreement whereby the former would resign with a "clean record." Beginning in January 1987, Mr. Abramowitz entered into settlement negotiations with then Assistant Regional Counsel Robert Hermann. During that period, appellant continued drinking and consulted with Dr. Weinstein, who provided him with a January 22, 1987 note, stating that appellant could not work until July 1, 1987 due to job-related stress. Appellant conceded on cross-examination that he was not intoxicated when he contemplated resigning.

On January 29, 1987, Mr. Matthews, Mr. Doering, Mr. Abramowitz met in Mr. Abramowitz's office after reaching an oral agreement whereby appellant would resign with a "clean record," i.e., with "no charges regarding the Halloween party," to be effective June 16, 1987. The agency agreed to permit appellant to exhaust his accrued sick leave and Mr. Matthews provided him with a positive letter of reference.

In March or April 1987, appellant was residing in New Hampshire where he was offered work with a real estate firm that his spouse's family owned. He heard rumors that the agency had fired him for sexual harassment and drinking on the job. Thereafter, Mr. Grubka, who had filed appeal of his demotion based on allegations that he had committed misconduct during the Halloween party, informed appellant that in early 1987, the former had received the unsanitized investigation file in appellant's case. Appellant became angry because he believed that his professional reputation had been ruined and that the agency had violated the oral settlement agreement.

Appellant introduced into evidence a copy of his diary, which contained detailed entries for meetings or conversations occurring on November 29, December 4, 8, 11, 12, and 23, 1986 and January 1987. Appellant's Hearing Exhibit 2. Those entries demonstrate that appellant understood and recalled what transpired during the meetings and conversations. *Id.* They also show that he asked relevant questions about the reasons for the agency's actions as well as his rights should the agency take a demotion action against him. Additionally, they confirmed that appellant understood the terms of the parties' oral settlement agreement pursuant to which he tendered his resignation. *Id.*

Concerning events occurring after appellant submitted his resignation, the agency's file contains a May 4, 1987 letter from appellant to then agency Commissioner Gibbs, stating, inter alia, that the appellant believed that Mr. Matthews's actions in threatening to propose the former's demotion and the agency's release of his

unsanitized investigation file to Mr. Grubka were improper. He further stated that his "nerves were shot" because of the manner in which he was treated and that he "did not wish to stay with the agency." He did, however, insist that the agency investigate his allegations that Mr. Matthews committed improper actions.

On June 4, 1987, appellant informed Mr. Matthews that he was "postponing my resignation pending the results of the investigation I requested" from Commissioner Gibbs, adding that he requested an additional six days sick leave based on his doctor's recommendation. Agency File, Tab C. He further stated that his "post-dated resignation" is "null and void." In response, Mr. Matthews informed appellant, by letter dated June 15, 1987, that appellant's request for advanced sick leave and to postpone his resignation was denied because his resignation was "unconditional" and "irrevocalbe." *Id.* at Tab D.

By letters dated June 15 and 26, 1987 to Robert Hilgen, the agency's then Executive Secretary, appellant stated that he believed that Mr. Matthews's decision to separate appellant by resignation was improper and requested an agency investigation. *Id.* at Tabs F and G. In a written response dated September 23, 1987, Mr. Hilgen informed appellant that after review of the entire matter, his office concluded that the agency's action regarding appellant's separation were appropriate. *Id.* at Tab K.

On appeal to the Board, appellant submitted a June 20, 1990 affidavit from Dr. Weinstein, to support the former's claim that the circumstances surrounding his resignation had caused him to lack the mental capacity to resign. Case File, Tab 11. In his affidavit, Dr. Weinstein

stated that during the end of calendar year 1986 and through the beginning of calendar year 1987, he treated appellant for what he considered to be "severe depression." *Id.* He recalled writing a January 22, 1987 note, stating that appellant was being treated for job-related stress and was so disabled that he could not return to work until July 1, 1987. *Id.* He further stated that in his opinion, appellant was so depressed during the latter part of January 1987, that he was "irrational and unable to make a rational decision," adding that appellant could not even make a logical decision about "retirement" even if that decision was made in the presence of counsel. *Id.* He therefore concluded that appellant lacked the mental capacity to resign in January 1987. *Id.* In reaching that conclusion, he did not, however, cite the results any objective findings or relate any specific examples of irrational thinking or actions which would support his diagnosis of severe depression of his conclusion that appellant lacked the mental capacity to resign. Also, he failed to explain why he did not refer appellant to a psychiatrist if appellant's mental capacity deteriorated to the point where he was irrational.

To rebut Dr. Weinstein's affidavit, the agency elicited live testimony from Daniel W. Schwartz, M.D., a board-certified psychiatrist, who is the director of forensic psychiatry at the Kings County Medical Center in Brooklyn, New York and an associate professor of psychiatry at the New York Health Science Center, Brooklyn, New York. Dr. Schwartz testified that although he has never examined appellant, he found that there was insufficient medical evidence to support a finding that appellant was severely depressed or lacked the mental capacity to

resign in January 1987. He based his conclusion on his review of appellant's diary, Dr. Weinstein's treatment notes, Dr. Weinstein's January 22, 1987 medical note, and his June 20, 1990 affidavit. He testified that Dr. Weinstein's treatment notes for the period between November 29, 1986 through January 22, 1987, which the agency introduced into evidence, agency's hearing exhibit 3, indicate that Dr. Weinstein prescribed minimal dosages of xanax and librium, and such medication is used to alleviate stress and anxiety rather that severe depression. He explained that in treating severe depression, the physician must be concerned with the possibility that the patient may be suicidal. Thus, the physician would not prescribe medications such as librium and xanax which reduces the patient's anxiety, because the patient then loses his fear of committing suicide. Dr. Schwartz noted that Dr. Weinstein did not prescribe any medication for psychotic or irrational thought such as lithium. He also noted that Dr. Weinstein's notes contain entries on December 26, 1986 and January 22, 1987 indicating appellant's condition improved in contrast to Dr. Weinstein's June 20, 1987 affidavit which states that appellant's mental condition continued to deteriorated [sic] through the end of January 1987. He testified on cross-examination that appellant's diary entries do not reflect irrational or delusional thinking, but rather exhibit clear and rational thought, i.e., "a process of logical thought" about the events that transpired during the relevant period. In that regard, he noted that appellant asked specific and appropriate questions during meetings about the agency's actions and his rights. He further testified that appellant

may have used poor judgment in tendering his resignation pursuant to a settlement, but such action alone was not indicative of irrational thought. When asked on cross-examination about whether appellant's drinking during the relevant period could have affect [sic] his mental capacity, Dr. Schwartz testified that Dr. Weinstein's records contained no indication that appellant had slurred speech or unsteady gait that would suggest that appellant had been intoxicated. He pointed out that Dr. Weinstein gave no reasoning or clinical findings supporting his prognosis that appellant's medical disability would last until July 1, 1987. Finally, he noted that Dr. Weinstein did not refer appellant for psychiatric treatment.

The agency also elicited live testimony from Mr. Matthews and Mr. Hermann as well as affidavits from Mr. Doering and Mr. Jenkins dated August 13 and 28, 1990, respectively, indicating that appellant appeared capable of rationale [sic] decision-making during the relevant period. For example, Mr. Matthews recalled that although appellant appeared nervous during the December 8 and 23, 1986 meetings, appellant was alert, appeared to comprehend the information that the agency provided, and actively participated by asking pertinent questions about the agency's actions and his appeal rights should the agency take a demotion action. Mr. Doering and Mr. Jenkins gave similar accounts in their affidavits which tend to corroborate Mr. Matthews's testimony. Mr. Matthews and Mr. Doering also revealed that during the January 29, 1987 meeting, appellant appeared to understand what transpired and told them that he was resigning to pursue a family business in New Hampshire rather

than because he feared a proposed demotion. Mr. Hermann, who did not attend that meeting, testified that he had a meeting with appellant and Mr. Abramowitz on January 21, 1987, during which they discussed settlement terms and appellant actively participated by asking various questions about his health benefits, retirement rights, and leave balances. He noted that during the negotiations, Mr. Abramowitz did not express any concern about appellant's state of mind.

Finally, I note that in a July 31, 1990 affidavit from Mr. Abramowitz, which appellant submitted to establish, inter alia, that the parties entered into an oral settlement agreement on January 29, 1997 [sic], Mr. Abramowitz did not indicate that appellant appeared uncommunicative or irrational. Case File, Tab 12. Rather, he asserted that appellant appeared to suffer from "a great deal of emotional stress." *Id.* He added that he is not competent to make a medical determination as to whether appellant could understand the terms of the settlement agreement. *Id.* He did not, however, indicate that appellant's words or behavior caused him to believe that appellant had acted irrationally and, thus, was unable to enter into an agreement or resign.

The test for determining whether a resignation was involuntary based on an alleged lack of mental capacity is whether, at the time of the resignation, the employee is capable of making a rational decision to resign. *See Savage v. Department of the Air Force*, 30 M.S.P.R. 665, 668 (1986). That test does not require total incompetency or hospitalization, but rather focuses on whether the employee has the ability to make a rational decision. *See Lewis v. United States Postal Service*, 39 M.S.P.R. 236, 239 (1988); cf. *French*

v. Office of Personnel Management, 810 F.2d 1118, 1120 (Fed. Cir. 1987) (in determining whether an individual is incompetent, thereby requiring waiver of the one-year filing deadline for disability retirement applications under 5 U.S.C. § 8337(b) (West Supp. 1990), the statute may be satisfied by one having some minimal capacity to manage his own affairs, and not needing to be committed.)

Applying that standard here, I find that appellant failed to prove by preponderant evidence that he lacked the mental capacity to resign. In reaching that finding, I note that Dr. Weinstein, an internist, did not provide a reasoned explanation nor any clinical findings supporting his diagnosis that appellant was severely depressed and, thus, lacked the capacity to resign. Rather, he gave conclusory assertions that appellant had a mental disability that was expected to last until July 1, 1987, without providing examples of appellant's supposedly irrational thought patterns or indicating why appellant was not referred for psychiatric treatment if his condition was so severe. This significantly reduces the probative weight of Dr. Weinstein's opinion. *See Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 423 (1981). Conversely, Dr. Schwartz, who admittedly did not examine appellant, gave a reasoned explanation for his opinion that there is insufficient evidence to establish that appellant lacked the mental capacity to resign. For example, he pointed out that appellant's diary entries between November 1986 and January 1987, showed that appellant demonstrated rational thought during that period. He also noted that Dr. Weinstein's medical notes indicate that appellant's condition showed signs of improvement on December 26,

1986 and January 22, 1987, and that Dr. Weinstein prescribed minimal dosages of xanax and librium used for treating anxiety rather [sic] severe depression. Furthermore, he pointed out that Dr. Weinstein did not provided [sic] any clinical findings to support his conclusion that appellant's mental disability would last until July 1, 1987 or refer appellant for psychiatric treatment as might be expected if appellant suffered from severe depression. In addition to the medical evidence, the agency introduced live testimony from Mr. Matthews and Mr. Hermann and affidavits from Mr. Jenkins and Mr. Doering, indicating that appellant actively participated at meetings between December 1986 and January 29, 1987, including asking pertinent questions about agency actions as well as his rights. Although appellant testified that he was emotionally devastated and drank during the relevent period, his contemporaneous notes in his diary display rational thought. Mr. Abramowitz noted in his affidavit that appellant appeared to suffer from emotional stress, but he did not note that appellant appeared irrational through his words or actions. Accordingly, the record fails to establish that appellant lacked the mental capacity to resign.[4]

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[4] Based on my finding that appellant failed to show that he lacked the mental capacity to resign, I make no ruling on the agency's motion to impose a sanction against appellant for failing to comply with the August 9, 1990 order granting the agency's motion to compel answers to certain interrogatories and to produce certain documents. The agency sought that information to show that appellant was making decisions involving the purchase and disposal of assets and actively engaged in decisions regarding business and financial accounts between December 1986 and February 1987. *See* Agency's

3. Appellant failed to prove by preponderant evidence that the agency extracted his resignation through coercion and deception.

To establish that his resignation resulted from coercion and duress, appellant testified that Mr. Matthews failed to provide him with specific information concerning the alleged charges of wrongdoing for which the [sic] threatened to propose his demotion. He indicated that the agency had initiated its investigation of him based on an anonymous complaint. Notwithstanding the agency's lack of specificity concerning the grounds for any future proposed demotion action, he believed that he had no alternative but to resign especially since he was "emotionally devastated" at that time. He did, however, acknowledge in his diary that during the December 23rd meeting, the agency informed him: (1) that he would receive "formal charges" in the second week of January 1987; (2) that he would have an opportunity to make an oral reply before the agency issued its decision; (3) that if

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August 27, 1990 motion. The agency argued that such information would show that appellant possessed the mental capacity to resign. *Id.* Appellant did not comply with the August 9th order by failing to answer two interrogatories. The agency therefore requested that I draw an adverse inference against appellant. *See* Agency's September 24, 1990 pleading. Appellant's attorney attributed his noncompliance due to an oversight and argued that a sanction was not warranted because the agency was not prejudiced by his omission because it could have questioned appellant at the hearing about the information sought. Because I have already found that appellant had the mental capacity to resign, it is unnecessary to determine whether a sanction to further support the agency's case on that issue is warranted to serve the ends of justice.

the agency took a demotion action, he could appeal the action to the Board and request a hearing; and (4) that if the Board issued an adverse decision, he could appeal to the Federal Circuit. Appellant's Hearing Exhibit 2. He maintained that if he knew then what he knows now he would not have resigned. In that connection, he pointed out that Mr. Grubka was demoted based on charges of alleged wrongdoing stemming from his activities during and after the Halloween party, but the Federal Circuit found that the charges were unsupported and ordered that the agency cancel the action. *See Grubka*, 858 F.2d at 1576. he conceded that before resigning, he had negotiated, through counsel, an oral settlement containing the terms of his resignation, including his receipt of a "clean record," a letter of reference, and approved sick leave through the effective date of his resignation.

Mr. Grubka testified that the agency had a meeting with him similar to appellant's December 23rd meeting, but he refused to accept a voluntary demotion. He subsequently appealed his demotion action to the Board, and although the Board upheld the action, the Federal Circuit reversed it. He also testified that he has been receiving Office of Workers Compensation Program (OWCP) benefits since the [sic] sometime in 1989 for a mental disorder developed as a result of the agency's demotion action against him. Sometime after the agency canceled his demotion, he contacted Mr. Hermann, who is now an attorney with a private law firm, and indicated that certain supervisors in the agency's Buffalo District Office were interested in forming a professional association to represent them. He inquired about whether Mr. Hermann would be interested in representing them despite the fact

that Mr. Hermann had represented the agency in the former's demotion appeal. He further testified that during their conversation, Mr. Hermann indicated that he had "recommended" to the agency that there was "no case" against Mr. Goodwin or him (Mr. Grubka), adding that he (Mr. Hermann) was merely discharging his duties when he represented the agency in Mr. Grubka's demotion appeal.

Marshall P. Capelleti, a former district director of the agency's Buffalo District Office, who retired in 1985, testified that the agency's investigation of Mr. Goodwin's alleged wrongdoing at the Halloween party was unusual and not in accordance with standard agency operating procedures. In that regard, he testified that he would have referred the anonymous complaint concerning appellant to the agency's Inspection Service and have them conduct their own investigation. He indicated that agency procedures provide that such a referral should have been made, but he could not identify those procedures. I note, however, that section 214.33(1) of the agency's IRM provides that allegations of administration offenses, i.e., "Misconduct which is not criminal in nature," are "routinely handled directly by supervisors without involvement of Inspection." Appellant's Closing Brief, Supplemental Exhibit.

The agency specifically denied that it extracted appellant's resignation through coercion or duress. To support that position, the agency presented testimony from Mr. Matthews that after receiving an anonymous complaint on or about November 20, 1986, that appellant had sexually harassed female employees and appeared

intoxicated during the Halloween party, he placed appellant on administrative leave and later detailed him to the Hamburg POD, so that the agency could conduct an investigation into those allegations without the possible perception that appellant might impede it. He further testified that before the December 23rd meeting, the investigation was completed and he had reviewed the investigation file as well as had interviewed some, but not all the participants at the Halloween party. Specifically, he recalled that both female trainees and agency instructors, who had attended the party, had accused appellant of sexual harassment and public intoxication. According to him, the information he had received had convinced him that there was sufficient substance to their assertions to propose appellant's demotion. He conceded that he did not inform appellant of the identities of his accusers. He did, however, testify that had the agency issued its notice of proposed demotion rather than appellant submitting his resignation, appellant would have received the written material that the agency relied on in proposing the action. He acknowledged offering appellant the option to take a voluntary demotion in lieu of his issuance of a proposed demotion. He denied informing appellant that his career was over or his family life would be ruined if he did not accept a voluntary demotion or suggesting that appellant resign. He noted that in March 1988, after appellant had resigned, the latter sent him a letter indicating the "real reason I (appellant) left Buffalo" was to pursue a family real estate business. Agency's Hearing Exhibit 10.

Mr. Doering and Mr. Jenkins indicated in their affidavits that during the December 23rd meeting, Mr. Matthews did not threaten to ruin appellant's career or

family life unless appellant accepted a voluntary demotion. Mr. Doering added that after appellant submitted his resignation he indicated that he "was doing well in the business in which he was then engaged."

Mr. Hermann testified that during settlement negotiations, Mr. Abramowitz, who was representing both appellant and Mr. Grubka at that time, indicated appellant wanted to resign with a "clean personnel record" because he had another job available. As to his telephone conversation with Mr. Grubka, he recalled that Mr. Grubka called him about whether the former would consider representing a professional association of supervisors at the agency's Buffalo District Office which Mr. Grubka was seeking to organize. According to him, he was surprised to receive the call because he had represented the agency against Mr. Grubka concerning the latter's demotion appeal before the Board. Moreover, he recalled that at the conclusion of the Board hearing, he made a conciliatory gesture to Mr. Grubka by offering to shake his hand, but Mr. Grubka refused. He testified that during his telephone conversation with Mr. Grubka, he congratulated Mr. Grubka concerning the Federal Circuit's decision in the latter's appeal. However, he specifically denied stating that the agency had no case against Mr. Grubka or appellant. He also indicated that his firm did not subsequently agree to represent Mr. Grubka due to a possible conflict of interest because his firm specializes in tax law.

A resignation is not voluntary where an agency imposes the terms of an employee's resignation, the employee's circumstances permit no alternative but to accept, and those circumstances were the result of

improper agency acts, including coercion or deception. *Schultz*, 810 F.2d at 1136. However, where an employee is faced merely with the unpleasant alternatives of resigning or being subjected to an adverse action, such limited choices do not render the resignation involuntary. *Id.* On the other hand, inherent in that proposition is that the agency has reasonable grounds for threatening to take an adverse action. *Id.* In *Schultz*, the Federal Circuit held that if an employee can show that the agency knew that the reason for threatening the removal could not be substantiated, the threatened action is purely coercive, rendering the resignation involuntary. *Id.* There, the court found the resignation was involuntary because the agency had suggested that the employee resign rather than face a removal action for unauthorized absence when the agency knew that appellant was entitled to sick leave. *Id.* at 1137. I also note that in determining whether a resignation resulted from coercion or duress, the court and the Board have adopted the following tripart test: (1) whether one side involuntarily accepted the terms of another; (2) whether the circumstances permitted no other alternative; and (3) whether the circumstances were the result of coercive acts on the part of the opposite party. *Id.* at 1135; *Myslik v. Veterans Administration*, 2 M.S.P.R. 69, 71 (1979). That test is objective; it is not measured by the employee's subjective evaluation of the situation. *Myslik*, 2 M.S.P.R. at 71.

In the instant case, appellant failed to establish by preponderant evidence that he involuntarily accepted the agency's terms for his resignation. Unlike *Schultz*, the agency did not suggest to appellant that he consider resigning in lieu of facing an adverse action. Rather, Mr.

Matthews offered appellant the option of taking a voluntary demotion rather than receive a notice of proposed demotion. Appellant, through his then representative, Mr. Abramowitz, indicated that appellant would be willing to tender his resignation provided the latter receive a "clean record." He then essentially set the condition for appellant's resignation. As previously noted, appellant agreed to resign in exchange for, inter alia, a clean record, a positive letter of reference from Mr. Matthews, and agency approval for him to exhaust his accumulated sick leave. Also, appellant's diary indicated that during the December 23rd meeting, appellant was informed that the agency would issue a proposal notice the second week in January 1987. Thus, appellant was not under extreme time pressure when he proposed his resignation as an alternative to Mr. Matthews's options that appellant accept a voluntary demotion or face a proposal notice. *See Robinson v. Department of the Navy*, 30 M.S.P.R. 12, 15 (1986). Accordingly, appellant did not involuntarily accept the agency's terms when he resigned.

The record also fails to establish that the circumstances under which appellant resigned, permitted appellant no alternative, but to resign. In that regard, appellant was then represented by the same attorney as Mr. Grubka, who refused to accept a voluntarily demotion and then successfully fought his demotion. Thus, appellant also had an alternative in that he could have stood pat and fought his proposed demotion. *See Christie*, 518 F.2d at 587. Appellant's claim that his mental condition precluded him from fighting the demotion action is, for reasons already discussed, unsupported. The fact that he may exercised [sic] poor judgment in proposing to resign

and then tendering his resignation does not render his resignation involuntary. *Id.*

Finally, appellant failed to prove by preponderant evidence that Mr. Matthews knew that he had no basis for threatening to issue a notice of proposed demotion. Although Mr. Matthews did not disclose specific details of the charges or the agency's proof to appellant, he testified that he had considered the agency's investigation file as well as interviews with agency trainees and instructors who attended the Halloween party and asserted that appellant was drunk and sexually harassed subordinate female employees there. He also testified that the agency did not provide appellant with the material that the agency relied on to support a proposed demotion action because a proposal notice was not issued after appellant expressed his willingness to resign as a settlement proposal. The fact that he did not provide such information to appellant or disclose at the December 23rd meeting specific details concerning the basis for the demotion action, standing alone, does not establish that Mr. Matthews knew that he had no basis for threatening to propose a demotion action before appellant tendered his resignation. *See Griessenauer v. Department of Energy,* 754 F.2d 361, 364 (Fed. Cir. 1985). also, the fact that Mr. Grubka prevailed in his appeal before the Federal Circuit, does not mean that appellant was innocent of all wrongdoing because each faced separate allegations of wrongdoing, although the allegations arose from their activities during the same party. Appellant's testimony does not show that Mr. Matthews knew that the [sic] had no arguable basis for threatening to propose appellant's demotion during the December 23rd meeting. Although

appellant testified that Mr. Matthews indicated that the proposal notice would include only a charge of intoxication, his diary indicated that the agency would also charge that he made "suggestive comments." Appellant's Hearing Exhibit 2. This tends to diminish appellant's credibility because his testimony was not consistent with contemporaneous notes. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 459 (1987). Mr. Grubka testified that Mr. Hermann had said during their telephone conversation that the latter had "recommended that the agency had no case against Mr. Grubka and appellant. He conceded that he has been receiving OWCP for a mental condition resulting from the agency's demotion against him. Mr. Hermann gave direct, forthright, and unswerving testimony in which he specifically denied telling Mr. Grubka that he had "recommended" that the agency had no case against appellant or Mr. Grubka, adding the Board had sustained Mr. Grubka's demotion, although the Federal Circuit later reversed it. He also testified that at the conclusion of Mr. Grubka's demotion hearing before the Board, Mr. Grubka had rejected the former's conciliatory gesture to shake hands. I credit the testimony of Mr. Hermann's testimony over that of Mr. Grubka because the latter was biased against the agency since it took an unjustified personnel action against him which Mr. Grubka indicated affected his mental condition. *See Hillen*, 35 M.S.P.R. at 459-60. Mr. Grubka did make an unsolicited call to Mr. Hermann, but the former previously betrayed some bitterness toward Mr. Hermann at the former's demotion appeal by rejecting Mr. Hermann's conciliatory gesture. Mr. Hermann betrayed no bias against Mr. Grubka or appellant despite a vigorous cross-

examination. The mere fact the [sic] he currently handles cases involving tax law does not establish that he fabricated his testimony because of a bias in favor of the agency. Based on all the foregoing, I find that Mr. Matthews's threat to propose appellant's demotion was not a coercive act which rendered appellant's resignation involuntary.

In summary, I find that appellant failed to prove by preponderant evidence that the agency extracted his resignation through coercion or duress.

5. The record establishes that the parties entered into an oral settlement, the terms of which included, appellant's resignation from his position.

The parties indicated that in January 1987, they entered into an oral agreement, the terms of which included appellant's resignation. They agree on most of the settlement terms, but disagree on others. Their positions as to the settlement terms are set both below.

Appellant testified that he entered into an oral agreement to resign in January 1987, in exchange for a "clean record" with "no charges" stemming from the Halloween party, a positive letter of reference from Mr. Matthews, and approved sick leave through the effective [sic] of his resignation. He further testified that he believed that the agreement required the agency to destroy its investigation file concerning charges that he engaged in misconduct during the Halloween party. He also gave substantially the same account in his diary, but the date on top that entry was altered. Appellant's Hearing Exhibit 2.

Mr. Abramowitz, in his affidavit, supported appellant's testimony as to the settlement terms. Specifically, Mr. Abramowitz asserted that he recalled in January 1987, that Mr. Matthews came to the former's office, and that they reached the following oral agreement: (1) Appellant would resign, but after being permitted to exhaust about six months of accumulated sick leave; (2) Mr. Matthews would provide appellant with a mutually acceptable letter of reference; and (3) the agency would destroy all investigation material regarding the charges and events emanating from the Halloween party, including but not limited to, statements made by any third parties.

The agency presented live testimony and affidavits to establish that the parties reached an oral settlement, which did not require the agency to destroy its investigation file concerning allegations that appellant engaged in misconduct during the Halloween party. Specifically, Mr. Matthews testified that the parties had reached an oral agreement before he appeared in Mr. Abramowitz's office on January 27, 1987. According to his testimony, the parties' oral agreement provided that: (1) Appellant would resign after he exhausted his accumulated sick leave[5]; (2) he would receive "a clean record," i.e., appellant's official personnel record would not reflect that he resigned in the face of pending charges of misconduct; (3)

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[5] Mr. Mathews testified that the agency agreed to permit appellant to exhaust his sick leave after appellant submitted a January 22, 1987 note from Dr. Weinstein indicating that appellant was unable to work until July 1, 1987 due to work-related stress. Agency File, Tab 4Q.

he would receive a letter of reference; and (4) the agency would place in the Buffalonian, the agency's local employee newspaper, appellant's statement of his reasons for his resignation. He denied that the agency had agreed to destroy the investigation file in appellant's case, adding that certain documents in that file were necessary in taking and defending the demotion action against Mr. Grubka. He testified that after the parties had entered into an oral agreement, Mr. Doering and he met with Mr. Abramowitz and appellant in Mr. Abramowitz's office. During the meeting, appellant submitted his resignation and Mr. Matthews gave him a letter of reference. Mr. Matthews compared that meeting with "a real estate closing" where the parties met after they had entered into a contract to comply with the contractual provisions. Mr. Doering, in his affidavit, corroborated Mr. Matthews's account of the agreement as well as the January 27, 1987 meeting.

Mr. Hermann testified that he met with Mr. Abramowitz and appellant, on January 21, 1987, during which they had reached an oral agreement. He testified that their agreement contained the settlement terms which Mr. Matthews described, including the term that appellant would receive "a clean personnel record." He also indicated that appellant raised concerns about his health insurance benefits, retirement rights, and accrued "credit hours," and that those matters were resolved. He testified that the agency had not agreed to destroy the investigation file in appellant's case because such material, such as statements of witnesses, were needed in defending the agency's demotion action against Mr. Grubka. He added that he believed that Mr. Grubka had a

due process right to the information in that file in pursuing his own appeal. Finally, he asserted that Mr. Abramowitz had requested that Mr. Matthews have a perfunctory meeting with appellant and Mr. Abramowitz because it would enable appellant to undergo a "catharsis."

Based on the evidence presented, I find that the parties entered into an oral agreement in January 1987, whereby (1) appellant would resign after exhausting his accumulated sick leave, (2) the agency would provide him with a "clean personnel record" (3) as well as a mutually agreeable letter of reference from Mr. Matthews, and (4) the agency would publish in its local employee newspaper the reason that he gave for resigning. In that regard, Mr. Matthews, Mr. Hermann, Mr. Doering, Mr. Abramowitz, and appellant in their live testimony or affidavits essentially agreed on the first three terms. As to the fourth provision, Mr. Matthews and Mr. Hermann in their live testimony as well as in a corroborating affidavit from Mr. Doering indicated that the agency agreed to publish in its local employee newspaper the reason appellant gave for resigning. While appellant and Mr. Abramowitz failed to refer to that provision in their account of the agreement, they did not specifically deny that the agency agreed to publish such information at appellant's request if he resigned. Nor does the record contain any indication that appellant objected to such a provision. That provision was intended for appellant's benefit, specifically, to inform other agency employees that appellant was resigning for personal reasons. I, therefore, find that it is more likely than not that the fourth provision was a part of the parties' oral agreement.

The agency did not, however, agree to destroy the investigation file in appellant's case concerning allegations that appellant engaged in misconduct during the Halloween party. In reaching that finding, I credit the live testimony of Mr. Matthews and Mr. Hermann together with Mr. Doering's affidavit over appellant's testimony and Mr. Abramowitz's affidavit. Specifically, I note that Mr. Hermann gave forthright, detailed, and sincere testimony which was unshaken after vigorous cross-examination. This tends to enhance his credibility. *See Hillen*, 35 M.S.P.R. at 458-59, 462. Equally important, he gave a persuasive reason why the agency did not agree to destroy the investigation file in appellant's case. He explained that the agency needed that material to defend against Mr. Grubka's demotion appeal because that case arose out of circumstances similar to that of appellant and that the investigation file in appellant's case contains statements mentioning both appellant and Mr. Grubka. He also indicated that the aggency [sic] needed to afford Mr. Grubka access to the file to protect the latter's due process rights. While appellant questioned the need to retain the file to protect Mr. Grubka's due process rights, he failed to present any evidence showing that the file was unnecessary to the agency's defense in the Grubka appeal. As a result, this further bolsters Mr. Hermann's credibility. *Id.* at 460. The mere fact that Mr. Hermann is currently in private practice specializing in cases involving tax law does not establish that he would fabricate his account to maintain a good relationship with the agency. Mr. Matthews provided detailed testimony consistent with that of Mr. Hermann. Moreover, Mr. Matthews testimony was corroborated by Mr. Doering's affidavit.

Although appellant testified that the agency agreed to destroy the investigation file in his case, he did not specifically testify that Mr. Matthews or Mr. Hermann had agreed to such a provision. As such, his testimony was less detailed than that of Mr. Hermann and Mr. Matthews. In his diary, he indicated that the agency agreed to that provision during a meeting that he attended with Mr. Abramowitz and Mr. Matthews. However, the date on top of that entry was altered and, thus, cannot be accorded significant probative weight. Appellant's Hearing Exhibit 2. Also, he did not indicate in his diary entry or testimony whether Mr. Doering was present during that meeting. Mr. Abramowitz's affidavit is less detailed than that of Mr. Doering or the live testimony of Mr. Hermann. Indeed, Mr. Abramowitz did not indicate whether Mr. Doering attended the January 1987 meeting with Mr. Matthews or the specific date of the meeting. For all these reasons, I find that the agency established by preponderant evidence that it did not agree to destroy the investigation file in appellant's case as part of the parties' oral agreement.[6]

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[6] Because the parties' oral settlement agreement did not require the agency to destroy the investigation file, it is unnecessary to address appellant's claim at the hearing and in his pleadings that the agency breached the agreement by providing Mr. Grubka with the unsanitized file rather than a sanitized file. In that connection, neither party has asserted that the agreement contained a provision that the agency could maintain the investigation file provided that the material was not disclosed to another individual without appellant's consent.

6. Appellant proved by preponderant evidence that appellant breached the terms of the oral settlement and extracted appellant's resignation through deception.

In his pleadings and at the hearing, appellant maintained that Mr. Matthews breached the parties' oral agreement by sending the agency's Director of Practice[7], Leslie A. Shapiro, a December 9, 1987 memorandum strongly recommending against appellant's application for enrollment to practice before the agency. *See* Appellant's Closing Brief at 13-16. Appellant had submitted such an application after tendering his resignation. Mr. Matthews submitted his December 9th memorandum in response to a November 10, 1987 inquiry from the Director of Practice regarding appellant's application. In his memorandum, Mr. Matthews stated, in pertinent part:

> In response to your November 10, 1987 inquiry concerning Mr. Goodwin's application, I strongly oppose his proposed enrollment. *I think it is important to understand that Mr. Goodwin resigned in the face of an administrative investigation which would have likely resulted in an adverse action against Mr. Goodwin.*

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[7] The agency's Director of Practice is responsible for adjudicating applications to practice before the agency from former agency employees. In adjudicating such an application, he may seek information from a former employee's supervisor concerning the employee's fitness to practice before the agency. He may then offer the employee an opportunity to respond to the supervisor's statement.

(Emphasis added). Appellant's Hearing Exhibit 3. Appellant testified that to date, the Director of Practice has still not issued a decision on his application.

Mr. Matthews conceded on cross-examination that although he believed that the agency had sufficient evidence to propose appellant's demotion, he did not know whether the agency would have demoted appellant. In that connection, he acknowledged that if he had issued a proposal notice, Mr. Brennan, the then Regional Commissioner, would have made a decision on the proposal after considering appellant's response. He did not indicate that Mr. Brennan had indicated what decision he would likely have made.

In response to Mr. Matthews's memorandum, appellant submitted an April 4, 1988 letter to the Director of Practice denying Mr. Matthews's assertions. Agency File, Tab 4A. He indicated that although the agency had conducted an investigation concerning his conduct before his resignation, his resignation "was strictly for personal enhancement reasons." *Id.*

The agency maintained that Mr. Matthews's assertions in his December 9th memorandum do not constitute a breach of the parties' oral agreement. Specifically, the agency argued that the agreement did not prelude the disclosure to another official within the agency that appellant resigned during an investigation into his conduct. Agency's Closing Brief at 5. Rather, the agency maintained that the agreement simply provided that appellant would receive a "clean personnel record." *Id.* The agency pointed out that the SF 50, in appellant's official personnel file, documenting his resignation, does

not mention the fact that appellant resigned during an investigation of his conduct. Agency File, Tab 4 H. It also pointed out that Mr. Matthews provided that information to its Director of Practice in response to the latter's inquiry and that the information was based on Mr. Matthews's personnel knowledge. Agency's Closing Brief at 5. The agency also pointed out that appellant's April 4th response advised the Director of Practice of the agency's investigation into appellant's conduct before appellant resigned.

A resignation is involuntary if the agency made misleading statements upon which the employee reasonably relied upon to his detriment. *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983). This is an objective test and, thus, it is unnecessary to inquire into an employee's subjective perceptions or the agency's subjective intents. *Id.*, 710 F.2d at 1575. The Board has held that an agency's breach of a settlement agreement that an employee resigns in exchange for a "clean record" may constitute deception sufficient to render a resignation. *Wobschall v. Department pf [sic] the Air Force*, 43 M.S.P.R. 521, 523-24 (1990); *Gleaves v. Department of the Navy*, 36 M.S.P.R. 558, 560 (1988); *Carter v. Department of the Navy*, 6 M.S.P.R. 95, 96-97 (1981). It is recognized that a non-breaching party to a settlement agreement, has a right to rescind the agreement. *See McClain v. United States Postal Service*, 40 M.S.P.R. 66, 70 (19898) [sic].

Appellant bears the burden of proving a breach of a settlement agreement as he alleged. *See Fredendall v. Veterans Administration*, 38 M.S.P.R. 366, 370 (1988). However, in construing the settlement terms, I note that the agreement is a contract between the parties, the interpretation

of which is a question of law. *See Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988); *McCall v. United States Postal Service*, 839 F.2d 664, 669 (Fed. Cir. 1988). As such, the Board must first look to the parties' settlement terms to determine the parties' intent. *See McClain*, 40 M.S.P.R. at 70; *Miura v. Department of the Navy*, 38 M.S.P.R. 663, 668 (1989). Parole evidence is admissible only where the settlement terms are ambiguous. *See Bonner v. Merit Systems Protection Board*, 781 F.2d 202, 206-07 (Fed. Cir. 1986) (the express language of an agreement must be considered when it is unambiguous).

Applying the aforecited precedent, I find that the agency breached the terms of the parties' oral agreement and obtained appellant's representation through deception. In that regard, the plain, unambiguous language of the agreement provided that the agency in exchange for appellant's resignation would, inter alia, provide appellant with a "clean personnel record" and a positive letter of reference. That required that appellant's personnel records reflect that he resigned for personal reasons without any pending charges that he engaged in misconduct during the Halloween party. The agency argued that it accomplished this because the SF 50, documenting appellant's resignation did not contain any comments regarding pending charges. I disagree. Mr. Matthews, a party to the settlement agreement, issued a December 9th memorandum to the agency's Director of Practice, stating that appellant "resigned in the face of an administrative investigation which would have likely resulted in adverse action" against appellant. Appellant's Hearing Exhibit 3. That statement indicates appellant resigned with pending charges against him and that the agency probably would

have taken an adverse action against him had he not resigned. Yet, Mr. Matthews conceded on cross-examination that although he had planned to propose appellant's demotion, he did not know what action, if any, the agency's deciding official would ultimately take. In any event, Mr. Matthews's statement in his December 9th memorandum violated the terms of the oral agreement by indicating that appellant resigned without a clean record. Even if Mr. Matthews's truly believed that the agreement did not preclude him from making such a statement, the agency's promise to provide appellant with a clean record was a misrepresentation because the agency withheld material information. Specifically, the agency never informed appellant that he would receive only "clean personnel documents" and that the agency would disclose that appellant would likely have received an adverse action for charges of misconduct had he not resigned. As to appellant's April 4, 1988 reply to Mr. Matthews's memorandum, appellant would not have had to explain the circumstances leading up to his resignation and Mr. Matthews complied with the oral agreement. Accordingly, I find that appellant show by preponderant evidence that his resignation was involuntary because it was obtained through a breach of a material term of the parties' agreement and deception.[8]

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[8] Based on my finding that the resignation was involuntary due the agency's breach of the oral agreement and deception, it is unnecessary to address appellant's claim that the resignation was also involuntary because the agency improperly refused his request to rescind his resignation before the effective date. For the same reason, I make no ruling on whether the resignation was invalid as a conditional resignation under IRM § 0715.5(3) (1980).

7. Appellant failed to show by preponderant evidence that the agency forced him to resign because he initiated a quality improvement plan.

In his pleadings and at the hearing, appellant maintained that the agency forced him to resign because he initiated a quality initiative improvement plan. He maintained that in 1986, he initiated such a program requiring review of pending agency cases, but the agency discontinued the program after his resignation.

To support his claim, he submitted an undated affidavit from Ralph J. Dortch, a branch chief in the agency's Buffalo District Office in 1986 and 1987. Appellant's Hearing Exhibit 1. In his affidavit, Mr. Dortch indicated that he was instrumental in implementing the quality initiative program that appellant initiated. *Id.* He also stated that the program was successful, but Mr. Matthews discontinued it after January 1987. *Id.* Finally, he asserted that Mr. Matthews told him that Mr. Brennan wanted to change the program. *Id.*

Appellant elicited testimony [sic] Mr. Grubka that Mr. Matthews appeared to have accepted appellant's quality initiative program, but Mr. Brennan overruled him. Mr. Grubka recalled that Mr. Brennan canceled the program because he wanted the agency's district offices within his region to adopt the quality initiative program developed in the agency's New Hampshire District Office which involved review of closed cases.

Mr. Matthews provided testimony consistent with that of Mr. Grubka. In that connection, he testified that the quality initiative program utilized in the agency's Buffalo District Office was altered in late 1986 or early

1987 at Mr. Brennan's direction. He testified that he had no involvement in Mr. Brennan's decision, adding that Mr. Brennan had adopted the New Hampshire program because he wanted uniformity within the region.

After reviewing the record as a whole, I find that appellant failed to show by preponderant evidence that the agency forced him to resign because of his quality initiative program. In that regard, Mr. Grubka and Mr. Matthews gave uncontroverted testimony that Mr. Brennan canceled the program in the Buffalo District Office because he wanted the district offices within the region to uniformly use the New Hampshire District Office's program. Their testimony is consistent with Mr. Dortch's affidavit. Appellant presented no evidence showing that Mr. Brennan was involved in appellant's decision to resign. Nor does the record contain any evidence showing that Mr. Matthews had influenced Mr. Brennan's decision. Consequently, I reject appellant's claim as unsubstantiated.

8. Appellant established by preponderant evidence good cause for the delay in filing his appeal with the Board and for a waiver of the time limit.

This case raises an issue of timeliness.[9] The Board's regulations in effect when appellant resigned provided that his appeal must be filed within twenty days of the

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[9] The Board in *Funk v. Department of the Army*, 44 M.S.P.R. 320, 322 (1990) recently held that jurisdiction issues must be addressed before ruling on the timeliness issue. Having determined that the Board has jurisdiction over the appeal, I have now addressed the timeliness issue.

effective date of his resignation. 5 C.F.R. § 1201.22(b) (1987). That time limit may be waived for good cause shown. 5 C.F.R. §§ 1201.12 and .22(c) (1987).

Here, appellant's resignation was effective on June 16, 1987, and his original appeal was filed with the Board on May 16, 1990, about two years and ten months after the regulatory deadline. In an acknowledgment order, he was ordered to present argument and evidence showing good cause for the delay. In his written response as well as in his June 20, 1990 prehearing submissions, appellant attributed the delay to the agency's failure to provide him with appeal rights concerning his resignation.

At the hearing, appellant testified that after tendering his resignation on January 29, 1987, he contacted Mr. Hermann before the effective date of his resignation and asserted that the agency had breached the terms of the parties' agreement by providing the investigation file to Mr. Grubka. Mr. Hermann acknowledged on cross-examination that he received such a call from appellant in March 1987. He also conceded that he did not provide appellant with appeal rights.

The record further reflects that in a letter dated June 4, 1987 to Mr. Matthews, appellant attempted to rescind his resignation, i.e., he stated that his resignation "was null and void," but Mr. Matthews issued a June 15, 1987 memorandum denying appellant's request without affording appellant any appeal rights to the Board. Agency File, Tabs 4I and K. Appellant subsequently wrote the agency letters dated June 15 and 26, 1987 and an undated letter which the agency received on August 26, 1987, stating that he believed that Mr. Matthews had acted

improperly in obtaining and then denying appellant's request to rescind his resignation. *Id.* at Tabs 4C, F and J. In response, the agency issued an August 13, 1987 letter from Regional Counsel Agatha A. [sic] Vorsanger and a September 23, 1987 letter from then Executive Secretary Hilgen, stating that the agency found no impropriety or illegality concerning appellant's resignation. *Id.* at Tab 4B and D. Those letters did not, however, advise appellant that he could file an appeal with the Board if he believed his resignation was involuntary. *Id.*

The agency argued that the appeal should be dismissed for untimely filing because appellant failed to exercise due diligence in pursuing his appeal rights. *See* Agency File, Tab 1; Agency Closing Brief at 16-20. Specifically, the agency pointed out that on December 28, 1988, appellant's attorney of record filed a civil action in United States District Court for the District of New Hampshire, alleging that appellant was constructively and wrongfully terminated due to Mr. Matthews's denial and appellant's request to rescind his resignation. Agency File, Tab 5C. In response, the Department of Justice filed a motion to dismiss the civil action, stating, inter alia, that the proper place for filing an appeal of an alleged involuntary resignation was the Board. *Id.* at 5B. Incorporated into the motion was a declaration from an Internal Revenue Service attorney, Mr. Carlin, stating that the Board has jurisdiction to decide whether a resignation was involuntary. Id. The motion contains a certificate showing that a copy was sent to appellant's attorney. *Id.* Finally, the agency pointed out that Mr. Doering in his affidavit stated that he informed appellant at the December 23, 1987 meeting of appellant's right to appeal a demotion

action to the Board. Agency's Hearing Exhibit 2. That statement is consistent with appellant's account in his diary. Appellant's Hearing Exhibit 2.

Shiflett v. U.S. Postal Service, 839 F.2d 669, 674 (Fed. Cir. 1988), the Federal Circuit held that where an agency has a duty to provide an employee with appeal rights to the Board and failed to do so, the regulatory time limit must be waived. In that case, the appellant filed a late appeal of an agency decision denying her request for restoration after he recovery from a compensable injury without providing her with appeal rights to the Board. *Id.* at 670. Before filing her appeal, she filed a grievance, with the agency denied. *Id.* In its grievance decision, the agency stated that 5 C.F.R. Part 353 "via the MSPB remains the appropriate means of appeal regarding reinstatement rights of individual who incurred an occupational-illness but who is now employable." *Id.* at 574. The court found that the agency had a duty under 5 C.F.R. § 353.308(a) to provide appellant with notice of appeal rights in its decision, and that notice must contain the information required under the Board's regulations at 5 C.F.R. § 1201.21. *Id.* The court also found that the general information about appeal rights in a separate grievance was insufficient to meet the requirement of § 1201.21. *Id.* It held that because the agency committed harmful error in violating § 353.808(a) and 1201.21 it was unnecessary to determine whether appellant exercised due diligence in pursuing her appeal rights.[10]

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[10] The agency in its closing brief cited the Board's decision in *Hamilton v. Tennessee Valley Authority*, 30 M.S.P.R. 57, 59-60 (1986) where the Board dismissed an appeal as untimely, in part,

Applying *Shiflett* to a case involving an alleged adverse action, the Board in *Ricci v. Veterans Administration*, 40 M.S.P.R. 113, 116 (1989) held that appellant must place the agency on notice that he considers the action involuntary before there "is a triggering of a duty on the part of the agency to provide notice of appeal rights." The Board reaffirmed in *Schrum v. Department of the Treasury*, 42 M.S.P.R. 103, 106 (1989), a case involving an alleged involuntary demotion, that the agency is under no duty to provide appeal rights, unless the action would, on its face, have been appealable to the Board or the employee placed the agency on notice that he considered the action involuntary before the agency issued its decision. In *Michaels v. United States Postal Service*, 44 M.S.P.R. 205, 208 (1990), the Board recently held that where the agency was on notice that the employee was claiming his resignation was involuntary, it [sic] failure to provide him with appeal rights to the Board was good cause for the employee's late filing of his appeal.

Here, appellant during a March 1987 conversation with Mr. Hermann and in June 4 and 15, 1987 letters to the other agency officials as well as in subsequent correspondence placed the agency on notice that appellant believed that his resignation was involuntary and that he desired to rescind it. Specifically, he informed the agency that he believed that the agency violated the parties' oral

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because the Department of Justice's motion in a related civil action in federal district court had put appellant and his attorney on notice of appeal rights to the Board eight months before the appeal was filed. That case, however, was decided before the Federal Circuit's decision in *Shiflett*. Therefore, I find that *Shiflett* is the controlling precedent.

agreement and that Mr. Matthews and [sic] obtained his resignation through improper means. Moreover, he informed Mr. Matthews that he considered his resignation "null and void." At that point, the agency was under an affirmative duty to provide appellant with appeal rights to the Board. *See Michaels*, 44 M.S.P.R. at 208; *Ricci*, 40 M.S.P.R. at 116; *see also Yuni v. Merit Systems Protection Board*, 784 F.2d 381, 386 (Fed. Cir. 1986); *McCormack v. United States*, 204 Ct. Cl. 371, 378 (1974). While the agency may have believed that appellant's resignation was voluntary and irrevocable, this did not relieve it of its affirmative duty to provide appellant with appeal rights once it had reason to believe that appellant considered his resignation involuntary. The Department of Justice's motion to dismiss and the attached affidavit from Mr. Carlin are insufficient to provide appellant with proper notice of appeal rights to the Board. Those submissions were part of a different proceeding from the subject appeal and were limited to show that the federal district court lacks jurisdiction over appellant's civil action. They do not comply with 5 C.F.R. § 1201.21 because they fail to inform appellant of the time limit and appropriate board address for filing an appeal with the Board. They also do not provide appellant with a copy of the Board's regulations for a printed appeal form with instructions on how to use it. Under similar circumstances, the Federal Circuit in *Shiflett* found that the information which the agency provided in its grievance decision was insufficient to constitute proper notice of appeal rights under § 1201.21. *Id.* at 674. I also note that he [sic] agency's information about appellant's appeal rights regarding a demotion

action does provide appellant with appeal right concerning his resignation. Because the agency failed to provide appellant with proper appeal rights, it is unnecessary to determine whether appellant exercised ordinary prudence in pursuing his appeal. *Id.* Accordingly, I find that appellant has established good cause for the delay and for a waiver of the regulatory time limit. *See Michaels*, 44 M.S.P.R. at 208.

In summary, appellant's resignation was involuntary; the Board has jurisdiction over the appeal; the agency's action cannot be sustained because the agency committed harmful error by failing to provide appellant with the statutory procedures required by 5 U.S.C. Chapter 75; and appellant showed good cause for the delay in filing his appeal and for a waiver of the regulatory time limit.

DECISION

The agency's action is REVERSED.

ORDER

The agency is ORDERED to cancel appellant's resignation and to retroactively restore appellant effective June 14, 1987. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is also ORDERED to issue a check to appellant for the appropriate amount of back pay, with interest, and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations, no later than 60 calendar

days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its efforts to comply.[11]

FOR THE BOARD: /s/ Arthur Joseph
Arthur Joseph
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on November 29, 1990, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on

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[11] Because appellant's resignation was effective June 16, 1987, the interim relief provisions under the Whistleblower Protection Act of 1989, Pub. L. 101-12, codified at 5 U.C.S. [sic] § 7701(b) (West Supp. 1990) do not apply here. *See Herring v. Department of the Treasury*, 44 M.S.P.R. 673, 675-76 (1990); *Marshall v. Department of Veterans Affairs*, 44 M.S.P.R. 28, 32 (1990).

which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 30 calendar days after the date this initial decision becomes final.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees and costs by filing a motion with this office no later than 20 calendar days after the date that this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 U.S.C. § 7701(g), 5 C.F.R. § 1201.37(a) and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant

David A. Goodwin
66 Mast Road
Dover, NH 03820

Appellant's Representative

Burton A. Nadler, Esquire
Petrucelly and Nadler
6 Beacon Street, Suite 720
Boston, MA 02108

Agency's Representative

Eileen P. Collins, Esquire
Department of Treasury
Internal Revenue Service
7 World Trade Center, 25th Floor
New York, NY 10048

Other

Marjorie Marks
U.S. Office of Personnel Management
Employee Relations Division
1900 E Street, NW, Room 7412
Washington, DC 20415

Date: October 25, 1990

/s/ Illegible for
Sonja R. Maxwell/aj
Administrative Officer

Standard Form SF-50
Revised November 1985
U.S. Office of Personnel Management

NOTIFICATION OF PERSONNEL ACTION

1. NAME (*Last, First, Middle*) GOODWIN DAVID A

2. SSN 002-32-6798

3. Illegible Illegible

4. Date of Birth 10-21-44

5. Veteran Preference

1–None 3–10 Pt. Disab. 5–10 Pt. Other
1 2–5 Pt. 4–10 Pt. Comp. 6–Illegible

6. Serv Comp. Date Illegible 03-06-69

7. Illegible 1

8. Retirement 1

9. FEGU BASIC LIFE PLUS ADDL OPTION W/2 TIMES
N PAY A STAD OPT & FAMILY DPT

10. FLSA

E E–Exempt
N–Non-Exempt

11. Sex M

12. Citizenship

1 1–US
2–Other

13. Comp Level

14. Effective Date 06-16-87

15. Annuiant indicator

9 1–Preempt
Ann–CS 3–RETM 5–RETM & CS
9 2–RETO 4–RETO & CS 6–Not Applicable

16. Work schedule

F I–Illegible O–PT Seasonal
F–Full-time G–FT Seasonal H–FT On Call
P–Part-time O–FT Seasonal R–PT On Call

17. (*Reserved for OPM Use*)

18–A. NOAC 317

18–B. Nature of Action RESIGNATION

18–C. Auth Code RPM

18–D. Authority REG 715.202

18–E. Aut Code

18–F. Authority

19–A. NOAC

19–B. Nature of Action

19–C. Code

19–D. Authority

19–E. Code

19–F. Authority

20. FROM: Position Title and Number

PROGRAM MGR
CH EXAM DIV 5601086001

21. Name and Location of Employing Office
INTERNAL REVENUE SERVICE
BUFFALO DISTRICT OFFICE
EXAMINATION DIVISION
EXAMINATION DIV-CHIEF & STAFF
BUFFALO, NY
22. Pay Plan & Occupational Code Gri 0340
23. Grade or Level 15
24. Step or Rate 00
25. Salary $63,157.00
26. Pay Base FA
27. TO: Position Title and Number
28. Name and Location of Employing Office
29. Pay Plan & Occupational Code
30. Grade or Level
31. Step or Rate
32. Salary
33. Pay Base
34. Station BUFFALO, NY #
35. Postion Occupied

1–Competitive 3–SES General
1 2–Excepted 4–SES Career Reserved

36. Appropriation Code (Optional) 21-10000-0306-0
37. Remarks CODE '1' IN BLOCK 8 INDICATES C8
CODE 'F' IN BLOCK 16 INDICATES FULL-TIME
EMPLMT NOT IN A SEASONAL/ON-CALL PROG

REASON FOR RESIGNATION: NONE GIVEN
FORWARDING ADDRESS: 66 MAST ROAD, DOVER, NEW HAMPSHIRE 03820
LUMP-SUM PAYMENT TO BE MADE FOR ANY UNUSED ANNUAL LEAVE.

38. Approval

39. FPMIS Data

A. Title of Approving Official
FOR THE APPOINTING OFFICER

B. Date 06-15-87

A. Supr. or Non supr. Ind. 3	B. VEV IND N C. PRD O
D. Barg Unit Status 8888	E. Functional Illegible
F. Educational Level 09	G. Year Degree Attained
H. Academic Discipline	I. Agency Code TR07
J. Location Code 36-0750-029	K. SON 2763

N. O. P. Q.

Authentication of Approving Official

/s/ J. L. Bugapki

DESIGNATED APPOINTING OFFICIAL

Employing Department or Agency

Internal Revenue Service
memorandum

date: December 9, 1987

to: Leslie S. Shapiro
Director of Practice

from: District Director
Buffalo District

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subject: Application for Enrollment to Practice before the Internal Revenue Service by a Former Employee

In response to your November 10, 1987 inquiry concerning Mr. Goodwin's application, I strongly oppose his proposed enrollment. I think it is important that you understand that Mr. Goodwin resigned in the face of an administrative investigation which would have likely resulted in an adverse action against Mr. Goodwin.

In addition to the initial circumstances of Mr. Goodwin's resignation, he has conducted himself in an unprofessional and uncivilized manner since that time. His demeanor leads me to question what we might expect from Mr. Goodwin in any adversarial situation that should arise from his practice before the Service. His post-resignation conduct has precipitated an investigation by the Inspection Service and he has had extensive contact with the Office of the Secretariat of the Commissioner's Office.

For additional details concerning Mr. Goodwin's conduct, I suggest you contact:

Regional Inspector Joseph Reinbold
Internal Revenue Service
26 Federal Plaza
New York, New York 10278

Robert F. Hermann
Assistant Regional Counsel
(General Legal Services)
Office of Regional Counsel
Internal Revenue Service
26 Federal Plaza
New York, New York 10278

Robert F. Hilgen
Assistant to the Senior
Deputy Commissioner
Office of the Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

If I can provide further information concerning this matter, please let me know.

/s/ Gary H. Matthews
Gary H. Matthews

cc: Regional Inspector Joseph Reinbold

Assistant Regional Counsel Robert F. Hermann

Robert F. Hilgen
Assistant to the Senior Deputy Commissioner

Internal Revenue Service

District Director

Department of the Treasury

111 West Huron St., Buffalo, N.Y. 14202
Date: January 29, 1987

TO WHOM IT MAY CONCERN:

This letter will serve as a letter of personal recommendation for Mr. David A. Goodwin.

Mr. Goodwin has been employed by the Internal Revenue Service since June 30, 1969. He started his career as an Internal Revenue Agent. For the last thirteen years, he has held various increasingly responsible management positions. Since December 1, 1980, Mr. Goodwin has been the Chief, Examination Division for the Buffalo District. In this position he held full responsibility for examinations conducted in the district ranging from individual returns to Fortune 500 companies. The Examination division has in excess of 350 employees with approximately thirty management positions. Through Mr. Goodwin's guidance and direction, the Examination Division achieved excellent results during his tenure. Reflective of this is the fact that Mr. Goodwin was rated a Distinguished Performer in his first five years as Division Chief. Most notably, for the fiscal year ended September 30, 1986, he was rated Outstanding. This was the first such rating ever given a Division Chief in Buffalo District history.

Mr. Goodwin has been recognized both for his participative style of management and innovativeness. He is a proven leader in his field. He has been an asset to the Internal Revenue Service and would certainly prove to be

just as valuable in private industry. Mr. Goodwin has my full support and best wishes in future endeavors.

/s/ Gary H. Matthews
Gary H. Matthews
District Director
Buffalo District

6/7/87

Mr. Matthews

This letter is to inform you that I am postponing my resignation pending the investigation I requested from the Commissioner of Internal Revenue Service. Accordingly, the post-dated resignation calling for an effective date no later than June 30, 1987 is null and void.

Since I am still under a recommendation by my doctor not to return, I am requesting sixty days (60) advanced sick leave.

/s/ David A. Goodwin

Internal Revenue Service

District Director

Department of the Treasury

111 West Huron St. Buffalo, N.Y. 14202
Date: Jun 15, 1987

Mr. David A. Goodwin
66 Mast Road
Dover, New Hampshire

Dear Mr. Goodwin:

This will acknowledge receipt of your June 4, 1987 letter. Please be advised that your request for 60 days advanced sick leave is denied and that the effective date of your resignation will not be postponed. Your January 29, 1987 resignation upon the termination of your accrued sick leave was unconditional and irrevocable, and, in accordance therewith, the position of Chief, Examination Division has been filled.

Examination of your leave records reflects that your present accrued sick leave balance of two hours will be absorbed on June 15, 1987 at 10:00 AM. You will be carried on credit and/or annual leave until end of business June 16, 1987. (Details concerning the calculation of your accrued sick leave will be forthcoming from Personnel under separate cover). Accordingly, enclosed is a Standard Form 50 effectuating your resignation as of June 16, 1987.

Sincerely,

/s/ Gary H. Matthews
Gary H. Matthews
District Director

REGIONAL COUNSEL

Internal Revenue Service
North Atlantic Region
Jacob Javits Building
23 Federal Plaza, 12th Floor
New York, New York 10278

July 16, 1987

CC:NA:RC
ALVorsanger

Mr. David A. Goodwin
66 Mast Road
Dover, New Hampshire 03820

Dear Mr. Goodwin:

This letter acknowledge receipt of your June 26, 1987 letter addressed to Robert Hilgen, which has been referred to me for appropriate action.

Please be advised I am presently reviewing your allegations that illegal procedures were utilized in terminating your employment with the Internal Revenue Service and will communicate with you when that review is completed.

Sincerely yours,

/s/ Agatha L. Vorsanger
AGATHA L. VORSANGER
Regional Counsel

Department of the Treasury

REGIONAL COUNSEL

Internal Revenue Service
North Atlantic Region
Jacob Javits Building, 12th Floor
New York, New York 10278

August 13, 1987

Mr. David A. Goodwin
66 Most [sic] Road
Dover, New Hampshire 03820

Dear Mr. Goodwin:

Please be advised that I have completed my review of your various allegations to the effect that illegal procedures were utilized in terminating your employment with the Internal Revenue Service. Upon review, I find no basis for determining that your resignation, submitted with the advice and assistance of counsel, was illegally procured or that the Buffalo district's actions in effectuating your resignation were illegal or otherwise improper.

Sincerely yours,

/s/ Agatha L. Vorsanger
AGATHA L. VORSANGER
Regional Counsel

Department of the Treasury

(seal)

Office of the
Executive Secretary

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

SEP 23 1987

Mr. David A. Goodwin
66 Mast Road
Dover, NH 03820

Dear Mr. Goodwin:

In several recent letters to this office, you have taken issue with the circumstances of your separation from the Internal Revenue Service. After a review of the entire matter, we have concluded that management's actions in connection with your separation were appropriate.

You have also made specific allegations of malfeasance against North Atlantic Regional executives, including the Director, Buffalo District and the Regional Commissioner. While a review is continuing into procurement practices utilized by the training function in the District, we have found no evidence of improper conduct on the part of Buffalo District management or other executives in relation to that issue or your other allegations.

Accordingly, I must inform you that I consider this matter closed.

Sincerely,

/s/ Robert F. Hilgen
Robert F. Hilgen
Executive Secretary